Conduct of a Spouse That Dissipates Property Available for Equitable Property Distribution: A Suggested Analysis

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I. INTRODUCTION

A substantial increase has occurred recently in the number of cases where, in an equitable distribution proceeding[1] in a noncommunity property (or "com-

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1. The hallmark of an equitable distribution system is the court's power to distribute between the spouses, in equitable or just proportions and in accordance with statutorily prescribed factors, property that is subject to the statute regardless of which spouse acquired or has record title to the property. For a general overview of statutory provisions regarding equitable distribution, see Becker, *Overview of Statutes Governing Property Distribution*, in 1 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY §§ 3.01-3.15 (J. McCahey ed. 1990).

All noncommunity property (or "common law") jurisdictions authorize some form of equitable property distribution upon divorce. *See* ALA. CODE § 30-2-51 (1989); ALASKA STAT. § 25.24.160(4) (Supp. 1989); ARK. STAT. ANN. § 9-12-315(a)(1)(A) (Supp. 1989); COLO. REV. STAT. § 14-10-113(1) (1987); CONN. GEN. STAT. § 46b-81(a) (1986); DEL. CODE ANN. tit. 13, § 1513(a) (Supp. 1988); D.C. CODE ANN. § 16-910(b) (1989); FLA. STAT. ANN. § 61.075(1) (West Supp. 1990); HAW. REV. STAT. § 580-47(a) (Supp. 1989); ILL. REV. STAT. ch. 40, para. 503(d) (Supp. 1990); IND. CODE § 31-1-11.5-11(b) (Supp. 1990); IOWA CODE § 598.21(1) (Supp. 1990); KAN. STAT. ANN. § 60-1610(b)(1) (Supp. 1989); KY. REV. STAT. ANN. § 403.190(1) (Michie/Bobbs-Merrill Supp. 1990); ME. REV. STAT. ANN. tit. 19, § 722-A(1) (1981); MD. FAM. LAW CODE ANN. § 8-205(a) (Supp. 1990); MASS. GEN. L. ch. 208, § 34 (Supp. 1990); MICH. COMP. LAWS § 552.23(1) (1988); MINN. STAT. § 518.58 subd. 1 (1990); MO. ANN. STAT. § 452.330 sec. 1 (Vernon Supp. 1990); MONT. CODE ANN. § 40-4-202(1) (1989); NEB. REV. STAT. § 42-365 (1988); N.H. REV. STAT. ANN. § 458.16-a(II) (Supp. No. 2 1989); N.J. REV. STAT. § 2A:34-23 (Supp. 1990); N.Y. DOM. REL. LAW § 236B(5)(a) (McKinney 1986); N.C. GEN. STAT. § 50-20(a) (1987); N.D. CENT. CODE § 14-05-24 (1981); OHIO REV. CODE ANN. § 3105.171(B) (Anderson Supp. 1990); OKLA. STAT. tit. 43, § 121 (Supp. 1990); OR. REV. STAT. § 107.105(1)(f) (1990); PA. CONS. STAT. ANN. tit. 23, § 401(d) (Purdon Supp. 1990); R.I. GEN. LAWS § 15-5-16.1(a) (1988); S.C. CODE ANN. § 20-7-472 (Law. Co-op. Supp. 1989); S.D. CODIFIED LAWS ANN. § 25-4-44 (Supp. 1989); TENN. CODE ANN. § 36-4-121(a) (Supp. 1990); UTAH CODE ANN. § 30-3-5(1) (1990); VT. STAT. ANN. tit. 15, § 751(a) (1988); VA. CODE. ANN. § 20-107.3(C)-(D) (1990); W. VA. CODE § 48-2-32(c) (1986); WYO. STAT. § 20-2-114 (1987).

mon law") jurisdiction,[2] one spouse contends that the other spouse has previously consumed,[3] given away[4] or otherwise transferred,[5] mismanaged,[6] converted,[7] or otherwise adversely affected[8] property that, had it been before the court, would have been subject to equitable distribution.

These cases pose a variety of difficult issues regarding the extent to which a court in an equitable distribution proceeding should be able to protect a spouse from conduct of the other spouse which affected property prior to the institution of divorce litigation. For example, assume that in a state where property acquired by either spouse prior to the entry of a divorce is subject to equitable distribution,[9] a spouse during separation uses funds she earned during the separation to pay for furnishings for her apartment or for an expensive vacation in Switzerland. Is the amount of money that was expended in any way relevant in the equitable distribution proceeding? Or, assume that prior to separation a spouse spends five thousand dollars of his earnings in entertaining a paramour. Is that expenditure at all relevant in an equitable distribution proceeding? Does it make a difference if the funds spent were taken from a joint bank account rather than from the earnings of the spouse? Does it matter if, instead of the funds being spent on a paramour, they were expended, without the knowledge

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See also WIS. STAT. § 767.255 (1987). Wisconsin has adopted the Uniform Marital Property Act (UMPA), and therefore for some purposes may be classified as a community property state. *See infra* note 124. However, the UMPA is silent as to divorce, and hence the above statute, which predates the adoption of the UMPA and which authorizes equitable distribution, continues to govern divorce actions. *See infra* note 132.

In Georgia, the statutory authority for equitable distribution is not explicit, but the existence of an equitable distribution system is well established. *See, e.g.*, Stokes v. Stokes, 246 Ga. 765, 771, 273 S.E.2d 169, 173 (1980). In Mississippi, there is no particular statutory base for equitable distribution, but the courts nonetheless permit a limited form of equitable division of property in connection with divorce. *See* Jones v. Jones, 532 So. 2d 574, 580 (Miss. 1988).

2. In a noncommunity property system, each spouse is free during the marriage to acquire and to own property to the exclusion of any ownership interest of the other spouse. For example, if one spouse purchases stock during marriage with her earnings and takes title to the purchased stock in her name alone, that spouse is the sole owner of the stock; the other spouse gains no ownership interest by reason of the marriage in property acquired by the other. In this respect a common law system differs markedly from a community property system; community property systems are discussed in more detail *infra* at text accompanying notes 105-23.

3. *E.g.*, *In re* Marriage of Partyka, 158 Ill. App. 3d 545, 552, 511 N.E.2d 676, 682 (1987) (money spent on household furnishings during spouses' separation, discussed *infra* at note 67 and accompanying text); Barriger v. Barriger, 514 S.W.2d 114, 115 (Ky. 1974) (money spent on, *inter alia*, gambling and entertainment, discussed *infra* at note 70 and accompanying text); Willis v. Willis, 107 A.D.2d 867, 868, 484 N.Y.S.2d 309, 310 (1985) (money spent on flying and snowmobiling hobbies, discussed *infra* at note 72 and accompanying text).

4. *E.g.*, Ahlo v. Ahlo, 1 Haw. App. 324, 329, 619 P.2d 112, 117 (1980) (irrevocable transfer of funds to the parties' children); Rosenberg v. Rosenberg, 64 Md. App. 487, 502-03, 497 A.2d 485, 492-93 (1985), *cert. denied*, 305 Md. 107, 501 A.2d 845 (1985) (gift by husband to woman friend). *See infra* note 79 and accompanying text.

5. *E.g.*, S.L.J. v. R.J., 778 S.W.2d 239, 244-45 (Mo. Ct. App. 1989), *cert. denied sub nom.* R.J. v. Kahn, 110 S. Ct. 1823 (1990) (money used by husband to repay a debt to his father, discussed *infra* at note 85 and accompanying text).

6. *See infra* decisions discussed at note 64 and accompanying text.

7. *E.g.*, Hogrebe v. Hogrebe, 727 S.W.2d 193, 197 (Mo. Ct. App. 1987).

8. *E.g.*, *In re* Marriage of Siegel, 123 Ill. App. 3d 710, 718-20, 463 N.E.2d 773, 780-81 (1984) (spouse's failure to pay mortgage payments, resulting in a loss of equity, discussed *infra* at note 62 and accompanying text); Gruver v. Gruver, 372 Pa. Super. 194, 200, 539 A.2d 395, 398 (1988), *appeal denied*, 520 Pa. 605, 553 A.2d 968 (1988) (refusal to sign joint tax return, discussed *infra* at note 63 and accompanying text).

9. Common law states vary as to the date after which property acquired by a spouse is no longer subject to equitable distribution. For example, property acquired by a spouse after the final separation of the parties is not subject to equitable distribution in some common law states, but is subject to equitable distribution in others. For a further discussion of statutory variations as to cut off dates, see *infra* note 42.

and consent of the other spouse, for nursing home care of the spending spouse's mother? What if the funds were given as a gift by the spouse to the spouse's child by a previous marriage? Does it matter if, in any of the above hypotheticals, the nonspending spouse was aware of the expenditures in advance, or subsequently became aware of the expenditures and did not protest?

Courts in common law states have developed various inconsistent or incomplete analytical frameworks for dealing with these types of problems. Issues regarding the correct analytical framework are important, and raise significant policy concerns. On the one hand, equitable distribution proceedings must be able to protect a spouse against inappropriate conduct by the other spouse that reduces the amount of property available for equitable distribution and that thereby adversely affects the property rights of the first spouse. This need for protection militates in favor of a system that extends the broadest possible protection. On the other hand, however, a set of rules designed to afford the broadest possible protection against inappropriate expenditures or conduct may unduly restrict the freedom of a spouse to deal with the spouse's own property and, therefore, conflict with general notions of the rights of a property owner in a common law system. Moreover, a set of rules designed to afford protection by permitting one spouse to question in a divorce proceeding, when parties have considerable rancor against each other, prior expenditures made by the other spouse may create too great a risk of perjury and unfounded accusations that would be difficult to rebut.

This article will first discuss existing analytical frameworks that exist in common law jurisdictions for dealing with this issue. The article will then discuss analytical frameworks in community property states and under the Uniform Marital Property Act and compare them to common law jurisdictions. The article will then present a suggested analysis.

II. Analyses Employed in Common Law States

A. *The Dissipation Doctrine*

One analytical approach that a number of common law states have developed to apply to the wrongful depletion problem is the dissipation doctrine. Under this doctrine, where a spouse has engaged in conduct that has dissipated (*i.e.*, diminished) the value of the marital estate,[10] a court in an equitable distribution proceeding may consider the dissipation as a factor in dividing the prop-

10. The precise type of expenditures and conduct that constitute dissipation will be discussed *infra*. *See* text accompanying notes 60-85. A few decisions have used the equivalent of a dictionary definition of the term "dissipation." For examples utilizing the *Black's Law Dictionary* definition of dissipation as the wasting or expending of funds foolishly, see *In re* Marriage of Getautas, 189 Ill. App. 3d 148, 155, 544 N.E.2d 1284, 1288 (1989) and Volesky v. Volesky, 412 N.W.2d 750, 752 (Minn. Ct. App. 1987). The great majority of the decisions on dissipation have not specifically adopted any such limited definition. *See, e.g.*, Martin v. Martin, 156 Ariz. 452, 455 n.3, 752 P.2d 1038, 1041 n.3 (1988) ("The word 'dissipation' . . . is not used in its usual limited sense. The word is used as a general term which includes excessive or abnormal expenditures, [and] destruction, concealment, or fraudulent disposition of . . . property . . . ."). *See also* E.E.C. v. E.J.C., 457 A.2d 688, 695 (Del. 1983), referring to the definitions in *Black's Law Dictionary* and the *American Heritage Dictionary* but concluding that the Delaware statute uses the term "dissipation" as the antonym for other statutory language requiring the court to consider, in making equitable distribution, the contribution of each party to the acquisition and preservation of

erty that remains,[11] or it may make an offset for the dissipated property by considering the property as still being available for distribution, awarding the dissipated property to the dissipating spouse, and awarding a corresponding amount of property to the other spouse.[12] In a few instances, a court has

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marital property. As will be discussed later, the dissipation doctrine has been applied to a wide range of expenditures.

11. *See, e.g., E.E.C.*, 457 A.2d at 695-97; *In re* Marriage of Petrovich, 154 Ill. App. 3d 881, 887, 507 N.E.2d 207, 211 (1987), *appeal denied*, 116 Ill. 2d 556, 515 N.E.2d 125 (1987); Lenczycki v. Lenczycki, 152 A.D.2d 621, 624, 543 N.Y.S.2d 724, 727 (1989); Smith v. Smith, 314 N.C. 80, 88, 331 S.E.2d 682, 687 (1985); Booth v. Booth, 7 Va. App. 22, 27-28, 371 S.E.2d 569, 573 (1988).

12. For example, if at the time of the equitable distribution hearing there exists $100,000 of marital property, and a spouse has previously dissipated $100,000 by gambling losses, the court could, if it determines that a 50% split is otherwise appropriate, award the dissipating spouse the $100,000 that has been previously dissipated and award the nondissipating spouse the existing $100,000. *See, e.g.*, Hartland v. Hartland, 777 P.2d 636, 643 (Alaska 1989); *In re* Marriage of Jones, 187 Ill. App. 3d 206, 222-24, 543 N.E.2d 119, 137 (1989); *In re* Marriage of Partyka, 158 Ill. App. 3d 545, 550, 511 N.E.2d 676, 680 (1987); Lynch v. Lynch, 411 N.W.2d 263, 266 (Minn. Ct. App. 1987); Hogrebe v. Hogrebe, 727 S.W.2d 193, 197 (Mo. Ct. App. 1987); Greco v. Greco, 73 Wis. 2d 220, 228, 243 N.W.2d 465, 470 (1976). A court could not both make an offset and consider dissipation as a factor in awarding the remaining assets. *See Hartland*, 777 P.2d at 643.

So far as the author is aware, no decision has held that a court does not have the power to make this kind of offset. (Whether a court may make a compensatory award of assets that *do not exist* at the time of the award is a different question, discussed *infra* at note 13 and accompanying text.) It might be argued that where the dissipation doctrine is founded on a statutory provision which permits a court to consider dissipation as a *factor* in dividing existing marital property (*see infra* note 14), then dissipation may only be considered as a factor and a court does not possess any power to make an offset award. However, such a contention seems invalid; no real difference exists between a decree that considers the dissipation of one spouse as a factor and awards the other spouse a very large percentage of the marital estate, and a decree that offsets against one spouse's share the amount that was dissipated by that spouse. In either case, the nondissipating spouse receives a larger percentage of the marital estate remaining after the dissipation. It is possible that under some circumstances the use of an offset approach could constitute an abuse of discretion. For example, it might constitute an abuse of discretion if a trial court were to make an award offsetting dissipated funds while refusing to consider the applicability of other factors statutorily mandated to be considered in making equitable distribution. It might be useful if a jurisdiction required that a court utilizing the offset approach specify why that approach is being used, as opposed to simply considering the dissipation as a factor.

Note that some decisions, without using the word "dissipation," permit a court in an equitable distribution proceeding to make a direct offset to a spouse to compensate or reimburse the spouse for the actions of the other spouse in appropriating marital property. These cases thus reach the same result as the decisions referred to in the first paragraph of this footnote. *See, e.g.*, Ahlo v. Ahlo, 1 Haw. App. 324, 329, 619 P.2d 112, 117 (1980); *In re* Marriage of Paulsen, 677 P.2d 1389, 1390 (Colo. Ct. App. 1984); S.L.J. v. R.J., 778 S.W.2d 239, 244-45 (Mo. Ct. App. 1989), *cert. denied sub nom.* R.J. v. Kahn, 110 S. Ct. 1823 (1990); *In re* Marriage of Hunter, 196 Mont. 235, 242, 639 P.2d 489, 492-93 (1982). For purposes of analysis, this article generally attempts to distinguish between decisions that utilize the term "dissipation" and thus may be said to employ a "dissipation doctrine," and decisions that do not use the term. Decisions that do not use the term "dissipation" are generally characterized in this article as employing a "marital property" approach. *See infra* text accompanying notes 94-104. As is developed *infra*, there is often no difference in result between these two categories of decisions insofar as determining whether a particular type of expenditure or conduct is appropriate. Rather, the essential difference is that jurisdictions that follow the marital property approach seem to have developed an even less satisfactory analytical structure than jurisdictions that follow the dissipation doctrine. *See infra* text accompanying notes 101-04. However, attempts to classify a decision into one of the two categories can pose problems. For example, there is a string of Missouri cases that do not use the term "dissipation" but that hold that one spouse can be reimbursed when the other spouse "squanders" property subject to equitable distribution. *E.g.*, Heins v. Heins, 783 S.W.2d 481, 484-85 (Mo. Ct. App. 1990); S.L.J. v. R.J., 778 S.W.2d 239, 244-45 (Mo. Ct. App. 1989), *cert. denied sub nom.* R.J. v. Kahn, 110 S. Ct. 1823 (1990); Nedblake v. Nedblake, 682 S.W.2d 852, 856 (Mo. Ct. App. 1984); Bland v. Bland, 652 S.W.2d 690, 692 (Mo. Ct. App. 1983); Calia v. Calia, 624 S.W.2d 870, 872 (Mo. Ct. App. 1981). However, at least two other Missouri decisions do use the term "dissipation." Hogrebe v. Hogrebe, 727 S.W.2d 193, 197 (Mo. Ct. App. 1987); *In re* Marriage of Faulkner, 582 S.W.2d 292, 295-96 (Mo. Ct. App. 1979).

awarded a compensatory monetary judgment against the dissipating spouse.[13]

The dissipation doctrine has various sources. Some state statutes specifically provide that dissipating conduct is a factor to be considered in determining what is an equitable or just distribution.[14] Other states use equivalent language that establishes as a factor conduct that diminishes the value or amount of marital property.[15] In either case, the statutory provisions are generally explicitly or

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13. The entry of a compensatory monetary judgment seems most appropriate, but also most controversial, when sufficient assets do not exist to compensate for the dissipated property. *See* A.I.D. v. P.M.D., 408 A.2d 940, 943 (Del. 1979). *See also* Martin v. Martin, 156 Ariz. 452, 457-58, 752 P.2d 1038, 1044 (1988) (court in a dissolution proceeding may award to a spouse a sum of money representing the value of an interest in community property not available for equitable division because of dissipation by the other spouse); *In re* Reinberg, 16 Fam. L. Rptr. (B.N.A.) 1428-29 (Fla. Cir. Ct. 1990). *Cf. In re* Marriage of Aslaksen, 148 Ill. App. 3d 784, 787, 789, 500 N.E.2d 91, 93, 95 (1986) (sustaining trial court's award of the balance of marital assets in the form of periodic maintenance payments over a five-year period); Harrell v. Harrell, 120 A.D.2d 565, 565-66, 502 N.Y.S.2d 57, 58-59 (1986) (trial court erred in refusing to consider making an equitable distribution to spouse of funds that had been dissipated by other spouse on ground that property was not in possession of other spouse). But for examples of courts holding that a court may not enter an award that exceeds the amount of the marital estate, see *In re* Marriage of McManama, 272 Ind. 483, 486-87, 399 N.E.2d 371, 373 (1980); Armstrong v. Armstrong, 181 Ind. App. 343, 346-47, 391 N.E.2d 855, 857 (1979); *In re* Marriage of Lippert, 627 P.2d 1206, 1209 (Mont. 1981).

A recent Ohio statutory provision provides that where a spouse has engaged in "financial misconduct, including but not limited to, the dissipation, destruction, concealment, or fraudulent disposition of assets," the court may make a "distributive award." OHIO REV. CODE ANN. § 3105.171(E)(3) (Anderson Supp. 1990). A "distributive award" is an award payable in a lump sum or over time and made from separate property or income. OHIO REV. CODE ANN. § 3105.171(A)(1) (Anderson Supp. 1990).

14. Equitable distribution statutes often require that a court consider statutorily prescribed factors in determining how to divide property between the spouses. *See generally* Becker, *supra* note 1, § 3.08.

For statutory provisions specifically listing dissipation as a factor, see DEL. CODE ANN. tit. 13, § 1513(a)(6) (1981) ("The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property"); D.C. CODE ANN. § 16-910(b) (1989) ("each party's contribution to the acquisition, preservation, appreciation, dissipation or depreciation in value of the assets subject to distribution"); ILL. REV. STAT. ch. 40, para. 503(d)(1) (Supp. 1990) ("the contribution or dissipation of each party in the acquisition, preservation, or depreciation or appreciation in value, of the marital and nonmarital property"); IND. CODE § 31-1-11.5-11(c)(4) (Supp. 1990) ("the conduct of the parties during the marriage as related to the disposition or dissipation of their property"); KAN. STAT. ANN. § 60-1610(b)(1)(C) (Supp. 1989) ("dissipation of assets"); MONT. CODE ANN. § 40-4-202(1) (1989) ("the contribution or dissipation of value of the respective estates"); N.J. STAT. § 2A:34-23.1(i) (Supp. 1990) ("The contribution of each party to the acquisition, dissipation, preservation, depreciation or appreciation in the amount or value of the marital property"); N.Y. DOM. REL. LAW § 236B(5)(d)(11) (McKinney 1986) ("the wasteful dissipation of assets by either spouse"); PA. CONS. STAT. ANN. tit. 23, § 401(d)(7) (Purdon Supp. 1990) ("The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital property"); TENN. CODE ANN. § 36-4-121(c)(5) (Supp. 1990) ("The contribution of each party to the acquisition, preservation, appreciation or dissipation of the marital or separate property"); W. VA. CODE § 48-2-32(c)(4) (1986) ("The extent to which each party, during the marriage, may have conducted himself or herself so as to dissipate or depreciate the value of the marital property of the parties: Provided, That except for a consideration of the economic consequences of conduct as provided for in this subdivision, fault or marital misconduct shall not be considered by the court in determining the proper distribution of marital property.").

Cf. OHIO REV. CODE ANN. § 3105.171(E)(3) (Anderson Supp. 1990) ("If a spouse has engaged in financial misconduct, including but not limited to, the dissipation, destruction, concealment, or fraudulent disposition of assets, the court may compensate the offended spouse with a distributive award or with a greater award of marital property.").

15. *See* MINN. STAT. ANN. § 518.58 subd. 1 (1990) ("the contribution of each in the acquisition, preservation, depreciation or appreciation in the amount or value of the marital property"); N.H. REV. STAT. ANN. § 458.16-a(II)(f) (Supp. No. 2 1989) ("The actions of either party during the marriage which contributed to the growth or diminution in value of property owned by either or both of the parties"); N.C. GEN. STAT. § 50-20(c)(11a) (1987) ("Acts of either party . . . to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of distribution"); VT. STAT. ANN. tit. 15, § 751(b)(11) (1989) ("the contribution of each spouse in the acquisition, preservation, and depreciation or appreciation

implicitly mandatory—*i.e.*, refusal to consider a statutory factor is an abuse of discretion.[16] Even in the absence of explicit statutory provisions, courts have held that dissipating conduct was encompassed by other specifically listed statutory factors[17] or by statutory "catch all" language.[18] Some decisions have permitted the consideration of dissipation of assets without relying upon a specific statutory base.[19]

Whatever its basis, the dissipation doctrine is sound public policy. Equitable distribution statutes were enacted to alleviate inequities that previously existed in common law states in connection with the economic consequences of divorce. Prior to equitable distribution, a court in a divorce action had no power to award to one spouse a share in property owned solely by the other spouse. Thus, prior to the advent of equitable distribution, a wage-earning or income-producing spouse was able to acquire property solely in his name, and then upon divorce be entitled to sole possession of such property, notwithstanding the

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tion in value of the respective estates"). *Cf.* N.H. REV. STAT. ANN. § 458.16-a(II)(l) (Supp. No. 2 1989) (court may consider the fault of a party if the fault caused the breakdown of the marriage and caused substantial physical or mental pain and suffering or resulted in substantial economic loss); S.C. CODE ANN. § 20-7-472(2) (Law. Co-op. Supp. 1990) (court must consider marital misconduct or fault, whether or not used as the basis for the divorce as such, if it affects the economic circumstances of the parties or contributed to the breakup of the marriage, provided that no conduct shall be considered if it occurred after the earliest of the entry of a pendente lite order, formal signing of a written settlement agreement, or entry of a permanent order of support).

16. Thus, statutes often provide that a court "shall consider" the statutory factors. *E.g.*, D.C. CODE ANN. § 16-910(b) (1989); KAN. STAT. ANN. § 60-1610(b)(1) (Supp. 1989); MINN. STAT. § 518.58 subd. 1 (1990); MONT. CODE ANN. § 40-4-202(1) (1989); N.J. REV. ANN. § 2A:34-23.1(i) (Supp. 1990); N.Y. DOM. REL. LAW § 236B(5)(d)(11) (McKinney 1986); N.C. GEN. STAT. § 50-20(c)(11a) (1987); OHIO REV. CODE ANN. § 3105.171(F) (Anderson Supp. 1990); R.I. GEN. LAWS § 15-5-16.1(a) (1988); TENN. CODE ANN. § 36-4-121(c)(5) (Supp. 1990). Moreover, judicial decisions often hold that consideration of the statutory factors is mandatory. *E.g.*, Wilen v. Wilen, 61 Md. App. 337, 355, 486 A.2d 775, 784 (1985); Binkley v. Binkley, 725 S.W.2d 910, 912 (Mo. Ct. App. 1987); Zipf v. Zipf, 8 Va. App. 387, 392, 382 S.E.2d 263, 266 (1989). With specific respect to dissipation as a factor, see *In re* Marriage of Merry, 213 Mont. 141, 153, 689 P.2d 1250, 1256 (1984) (pursuant to statute "court must consider any dissipation of an estate by one party").

17. It has been held that dissipation can be considered under a statutory directive to consider as a factor the "contribution" of a spouse to the acquisition of marital property or to the marriage. *See* Booth v. Booth, 7 Va. App. 22, 28, 371 S.E.2d 569, 572-73 (1988); Anstutz v. Anstutz, 112 Wis. 2d 10, 12-13, 331 N.W.2d 844, 846 (1983). In Hartland v. Hartland, 777 P.2d 636, 641, 643 (Alaska 1989), dissipation was held encompassed within the judicially developed factor of the "duration and conduct of each [party] during the marriage."

18. Some statutes contain a specific "catch all" provision, and others specifically permit, or are construed to permit, a court to consider relevant factors in addition to those that are statutorily prescribed. *See generally* Becker, *supra* note 1, § 3.08[2]. Courts have held dissipation to constitute an additional relevant factor. *See In re* Marriage of Paulsen, 677 P.2d 1389, 1390 (Colo. Ct. App. 1984) (depletion of assets permitted to be considered as a "relevant" factor in view of the statutory language that the court "consider[] 'all relevant factors,' including" the specifically listed ones). Dissipation has also been held relevant under statutory catch all provisions. *See Booth*, 7 Va. App. at 28, 371 S.E.2d at 573 (dissipation may be considered in view of statutory catch all provision permitting a court to consider such other factors as the court deems "necessary or appropriate" to consider); Smith v. Smith, 314 N.C. 80, 87-88, 331 S.E.2d 682, 687 (1985) (conduct which dissipates marital property for nonmarital purposes may be considered under statutory catch all provision permitting court to consider any other factor which the court finds to be "just and proper") (decided prior to the effective date of a statutory amendment which added as an additional statutory factor the conduct of a party in wasting marital property after the separation of the parties).

19. *See* Robinette v. Robinette, 736 S.W.2d 351, 353 (Ky. Ct. App. 1987); Rosenberg v. Rosenberg, 64 Md. App. 487, 502, 497 A.2d 485, 492 (1985), *cert. denied*, 305 Md. 107, 501 A.2d 845 (1985); Sharp v. Sharp, 58 Md. App. 386, 399, 473 A.2d 499, 505, *cert. denied*, 300 Md. 795, 481 A.2d 240 (1984); Hogrebe v. Hogrebe, 727 S.W.2d 193, 197 (Mo. Ct. App. 1987); *In re* Marriage of Faulkner, 582 S.W.2d 292, 295-96 (Mo. Ct. App. 1979). *But cf.* Kaye v. Kaye, 538 A.2d 288, 289 (Me. 1988) (specifically refusing to rule on whether a court can consider improper diminution of marital assets in making equitable distribution).

length of the marriage or the nonmonetary contributions of the other spouse. Equitable distribution statutes were adopted to correct this situation,[20] and decisions frequently have stated that the purpose of equitable distribution is to distribute to each spouse a share of the assets accumulated through the efforts of the spouses as partners in the marital enterprise.[21] Given that the primary purpose of equitable distribution is to achieve a fairer system of property distribution upon divorce, an equitable distribution system must permit a court to protect a spouse against transactions by the other spouse that adversely affect the interest of the non-active spouse in property subject to equitable distribution. The dissipation doctrine, whether broadly or narrowly defined,[22] generally achieves that result.

The dissipation doctrine should not be confused with rules regarding the effect of fault or marital misconduct of a spouse. Jurisdictions differ as to whether fault or marital misconduct of a spouse may be considered as a factor in making equitable distribution. A number of states statutorily provide that marital misconduct is a factor to be considered in making equitable distribution,[23] and others have judicially adopted rules that permit consideration of at

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20. *See, e.g.*, Hofmann v. Hofmann, 94 Ill. 2d 205, 222, 446 N.E.2d 499, 505 (1983); McLean v. McLean, 323 N.C. 543, 549, 374 S.E.2d 376, 380 (1988); Mauser v. Mauser, 75 N.C. App. 115, 119, 330 S.E.2d 63, 65 (1985).

21. *See, e.g.*, Davidson v. Davidson, 19 Mass. App. Ct. 364, 369-70, 474 N.E.2d 1137, 1142-43 (1985); Nardini v. Nardini, 414 N.W.2d 184, 192 (Minn. 1987); Weiss v. Weiss, 226 N.J. Super. 281, 287, 543 A.2d 1062, 1065 (App. Div. 1988), *cert. denied*, 114 N.J. 287, 554 A.2d 844 (1988); *McLean*, 323 N.C. at 549, 374 S.E.2d at 380; Berish v. Berish, 69 Ohio St. 2d 318, 319-20, 432 N.E.2d 183, 184 (1982).

On the other hand, equitable distribution should not be viewed as being concerned, in every state, exclusively with the property owned by the parties and how that property was acquired. Some of the factors that are mandated by statute have a lot more to do with general equitable concerns than with the role of the spouses in the acquisition of property. For example, in some states consideration of the fault or marital misconduct of a party may be required. *See infra* notes 23-24 and accompanying text. As another example, the need or economic circumstances of a party is a commonly listed statutory factor. *E.g.*, ARK. STAT. ANN. § 9-12-315(a)(1)(A)(vii) (Supp. 1989); COLO. REV. STAT. § 14-10-113(1)(c) (1987); CONN. GEN. STAT. § 46b-81(c) (1986); DEL. CODE ANN. tit. 13, § 1513(a)(8) (1981); D.C. CODE ANN. § 16-910(b) (1989); FLA. STAT. § 61.075(1)(b) (Supp. 1990); ILL. REV. STAT. ch. 40, para. 503(d)(4) (Supp. 1990); IND. CODE ANN. § 31-1-11.5-11(c)(3) (Supp. 1990); IOWA CODE § 598.21(1)(i) (1981); KY. REV. STAT. ANN. § 403.190(1)(d) (Michie/Bobbs-Merrill 1989); ME. REV. STAT. ANN. tit. 19, § 722-A(1)(C) (1981); MD. FAM. LAW CODE ANN. § 8-205(a)(3) (Supp. 1990); MASS. GEN. L. ch. 208, § 34 (Supp. 1990); MINN. STAT. § 518.58 subd. 1 (1990); MO. REV. STAT. § 452.330 Sec. 1 (Supp. 1990); MONT. CODE ANN. § 40-4-202(1) (1989); N.H. REV. STAT. ANN. § 458.16-a(II)(b) (Supp. No. 2 1989); N.J. REV. STAT. § 2A:34-23.1(f) (Supp. 1990); PA. CONS. STAT. ANN. tit. 23, § 401(d)(10) (Purdon Supp. 1990); TENN. CODE ANN. § 36-4-121(c)(8) (Supp. 1990); WIS. STAT. § 767.255(b) (1987).

22. The definitions of the doctrine are discussed *infra* at notes 39-59 and accompanying text.

23. Thus, some statutes include the causes of divorce as a factor. *E.g.*, CONN. GEN. STAT. § 46b-81(c) (1986) ("the causes for the annulment, dissolution of the marriage, or legal separation"); MD. FAM. LAW CODE ANN. § 8-205(a)(4) (1990) ("the circumstances that contributed to the estrangement of the parties"); N.H. REV. STAT. ANN. § 458.16-a(II)(l) (Supp. No. 2 1989) ("the fault of either party . . . if said fault caused the breakdown of the marriage and (1) [c]aused substantial physical or mental pain and suffering or (2) [r]esulted in substantial economic loss to the marital estate or the injured party"); S.C. CODE ANN. § 20-7-472(2) (Law. Co-op. Supp. 1989) ("marital misconduct or fault . . . whether or not used as the basis for a divorce as such, if the misconduct . . . affected the economic circumstances of the parties or contributed to the breakup of the marriage"); VA. CODE. ANN. § 20-107.3(E)(5) (1990) ("[t]he circumstances and factors which contributed to the dissolution of the marriage").

At least three statutes list as a factor the conduct of the parties during the marriage, without any further specificity. *See* MASS. GEN. L. ch. 208, § 34 (Supp. 1990); MO. REV. STAT. § 452.330 Sec. 1(4) (Supp. 1990); R.I. GEN. LAWS § 15-5-16.1(a) (1988).

least some degree of fault or marital misconduct.[24] In other states, however, marital misconduct that does not have economic repercussions is not a permissible factor. Thus, some statutes specifically provide that in making equitable distribution the court shall not consider the fault or marital misconduct of a party,[25] and in the absence of any statutory provision some judicial decisions preclude consideration of fault on various policy rationales.[26]

However, even where state law precludes consideration of fault or marital misconduct, evidence of conduct that has dissipated marital assets should not be excluded. Dissipating conduct is not equivalent to fault or marital misconduct. Unlike evidence of fault or marital misconduct, evidence of dissipation is di-

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However, even where a statute permits a court to consider fault as a factor, judicial decisions may curb the relevance of or the weight to be accorded to fault. For example, some Missouri cases have adopted a restrictive rule notwithstanding the breadth of the statutory language. *See, e.g.*, Burtscher v. Burtscher, 563 S.W.2d 526, 527-28 (Mo. Ct. App. 1978) (the factor of conduct during the marriage becomes important when the conduct of one party throws upon the other party marital burdens beyond the norms to be expected during a marital relationship; spouse's adulterous relationship, if any, occurred during only a small portion of a 24-year marriage and imposed no particular burdens on the other spouse); Divine v. Divine, 752 S.W.2d 76, 78 (Mo. Ct. App. 1988) (sexual infidelity after separation did not place any extra burden on the partnership endeavor); Mastin v. Mastin, 709 S.W.2d 545, 547, 550 (Mo. Ct. App. 1986) (husband's conduct did place more than normal burdens on wife in that, *inter alia*, she was required to change her lifestyle and was physically injured (apparently by contracting veneral disease from her husband)).

See also Aster v. Gross, 7 Va. App. 1, 5-6, 371 S.E.2d 833, 836 (1988), in which the court stated that circumstances that have no effect upon the marital property are not relevant to determining a monetary award, but where the trial court had considered fault that was apparently not related to the marital property and where the issue on appeal was whether the wife was entitled to introduce additional evidence of misconduct. *Cf.* Williams v. Williams, 297 S.C. 208, 211, 375 S.E.2d 349, 351 (Ct. App. 1988) ("[a]lthough fault does not justify a severe penalty in the equitable distribution . . . , it is a factor which may be considered").

24. *See, e.g.*, Davey v. Davey, 106 Mich. App. 579, 581, 308 N.W.2d 468, 469 (1981); Behm v. Behm, 427 N.W.2d 332, 337 (N.D. 1988) (marital misconduct is a proper factor, although "some members of this court" minimize its importance if it does not also involve economic misconduct); Grosskopf v. Grosskopf, 677 P.2d 814, 820 (Wyo. 1984) (fault is a proper factor, although such evidence may not be considered by the court to punish one of the parties). *Cf.* Sommers v. Sommers, 246 Kan. 652, 657, 792 P.2d 1005, 1010 (1990) ("in all but extremely gross and rare situations, financial penalties are not to be imposed by a trial court on a party on the basis of fault"); O'Brien v. O'Brien, 66 N.Y.2d 576, 589-90, 489 N.E.2d 712, 719, 498 N.Y.S.2d 743, 750 (1985) (marital fault may not be considered under New York's "catch all" factor, "[e]xcept in egregious cases which shock the conscience of the court"; marital fault is inconsistent with the underlying assumption that a marriage is in part an economic partnership and upon its dissolution the parties are entitled to a fair share of the marital estate, because fault will be difficult to assign and because introduction of the issue will involve the court in time consuming procedural maneuvers relating to collateral issues); Brancoveanu v. Brancoveanu, 145 A.D.2d 395, 398-99, 535 N.Y.S.2d 86, 90 (1988), *appeal dismissed*, 73 N.Y.2d 994, 538 N.E.2d 358, 540 N.Y.S.2d 1006 (1988) (egregious conduct found in that one spouse had tried to murder the other).

25. *E.g.*, ALASKA STAT. § 25.24.160(4) (Supp. 1989); COLO. REV. STAT. § 14-10-113(1) (1987); KY. REV. STAT. ANN. § 403.190(1) (Michie/Bobbs-Merrill 1990); MINN. STAT. § 518.58 subd. 1 (1990); MONT. CODE ANN. § 40-4-202(1) (1989); PA. CONS. STAT. ANN. tit. 23, § 401(d) (Purdon Supp. 1990); TENN. CODE ANN. § 36-4-121(a) (Supp. 1990); WASH. REV. CODE § 26.09.080 (Supp. 1990); W. VA. CODE § 48-2-32(c) (1986); WIS. STAT. § 767.255 (1987).

26. *See, e.g.*, Boyd v. Boyd, 421 A.2d 1356, 1358 (Me. 1980) (purpose of no fault grounds—to reduce guilt, bitterness, and conflicts—would be defeated if evidence relevant to fault could be introduced on the issue of property distribution); Chalmers v. Chalmers, 65 N.J. 186, 193-94, 320 A.2d 478, 482-83 (1974) ("fault may be merely the manifestation of a sick marriage" and is not relevant to the basic idea of equitable distribution, which is that on divorce each spouse should receive his or her fair share of what has been accumulated during the marriage); Wade v. Wade, 72 N.C. App. 372, 385, 325 S.E.2d 260, 271 (1985), *rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985) (alimony proceeding, and not equitable distribution proceeding, is the appropriate means for addressing the economic implications of marital misconduct); Lemon v. Lemon, 42 Ohio App. 3d 142, 145, 537 N.E.2d 246, 250 (1988); Thorpe v. Thorpe, 108 Wis. 2d 189, 202, 321 N.W.2d 237, 244 (1982). *Cf.* O'Brien v. O'Brien, 66 N.Y.2d 576, 489 N.E.2d 712, 498 N.Y.S.2d 743 (1985) (discussed *supra* at note 24).

rectly relevant to the issue before the court in an equitable distribution hearing, that is, determining what assets were accumulated during the marriage by the partners, and how such property is to be divided.[27] Therefore, even when state law precludes consideration of fault in an equitable distribution proceeding, a court should be able to consider evidence of conduct that has dissipated marital assets.[28] (Conduct of a spouse in connection with the divorce litigation that increases the attorney's fees of the other spouse is apparently not regarded as dissipating marital assets.[29])

Of course, evidence relating to dissipation of marital funds and evidence relating to marital misconduct are not always easily severable,[30] and the possibility therefore exists that a court will use evidence of dissipation of marital assets as an excuse to impose punishment for offensive conduct where state law precludes consideration of marital misconduct as such. Notwithstanding this possibility, the reported cases do not indicate that courts are impermissibly considering fault under the guise of the dissipation doctrine.[31]

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27. It seems generally accepted that the premise of equitable distribution is that marriage is an economic partnership insofar as the acquisition of property is concerned, and that the purpose of equitable distribution is to divide between the partners their fair share of the property accumulated. *See supra* note 21. Decisions or statutes that preclude evidence of fault seem premised on the conclusion that fault is irrelevant in this process. *See, e.g., Chalmers*, 65 N.J. at 193-94, 320 A.2d at 482-83; Blickstein v. Blickstein, 99 A.D.2d 287, 291-92, 472 N.Y.S.2d 110, 113 (1984); *Wade*, 72 N.C. App. at 385, 325 S.E.2d at 271, *rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (discussed *supra* note 26). Even those jurisdictions which permit the consideration of fault as a factor often limit the type of conduct which may be considered. *See supra* decisions discussed at note 23.

28. It appears that all of the courts that have decided the matter have held that evidence of dissipation of assets subject to equitable distribution may be considered even though evidence of fault is impermissible. *See, e.g.*, Hartland v. Hartland, 777 P.2d 636, 642 (Alaska 1989); Robinette v. Robinette, 736 S.W.2d 351, 354 (Ky. Ct. App. 1987); *Blickstein*, 99 A.D.2d at 293, 472 N.Y.S.2d at 114; Smith v. Smith, 314 N.C. 80, 87-88, 331 S.E.2d 682, 687 (1985). In this connection, note also that several of the statutes which specifically exclude evidence of fault specifically provide that dissipation is a factor to be considered. MINN. STAT. § 518.58 subd. 1 (1990); MONT. CODE ANN. § 40-4-202(1) (1989); PA. CONS. STAT. ANN. tit. 23, § 401(d) (Purdon Supp. 1990); TENN. CODE ANN. §§ 36-4-121(a), -121(c)(5) (Supp. 1990); W. VA. CODE § 48-2-32(c) (1986).

29. However, in such a situation, the other spouse may be awarded attorney's fees to compensate for the additional costs caused by such conduct. *See Hartland*, 777 P.2d at 644; *In re* Marriage of Cook, 117 Ill. App. 3d 844, 854-55, 453 N.E.2d 1357, 1365 (1983); Hogrebe v. Hogrebe, 727 S.W.2d 193, 194-95 (Mo. Ct. App. 1987).

30. For example, one factual situation that contains elements of both dissipation and misconduct is where one spouse makes a gift of funds that would have been subject to equitable distribution to a third party with whom the spouse is having an affair. *See, e.g.*, Mika v. Mika, 728 S.W.2d 280, 284 (Mo. Ct. App. 1987). *See also* Sommers v. Sommers, 246 Kan. 652, 657-58, 792 P.2d 1005, 1010 (1990) (discussing various hypothetical situations involving both fault which would not be a proper factor to consider and circumstances that would be properly relevant in making equitable division of property).

31. However, the line may be difficult to draw. For example, see *Hartland*, 777 P.2d at 642 (fault is not a factor in making equitable distribution; reading the trial court's statements *in context* indicates that trial court reduced spouse's share because of his dissipation of marital funds rather than because of his fault). *See also* Szesny v. Szesny, 197 Ill. App. 3d 966, 972-73, 557 N.E.2d 222, 226 (1990) (almost all of the parties' consumer debt of over $82,000 held to have been properly allocated to husband under dissipation theory; record held not to support husband's contention that division of marital debts was based on his physical mistreatment of his wife, because trial court "merely mentioned" wife's medical bills for plastic surgery necessitated by facial burns caused by husband and because trial court properly relied upon, *inter alia*, husband's "frequent beating of Petitioner when she questioned him each month when she tried to reconcile the check register with the bank statement"). *Cf.* Coleman v. Coleman, 89 N.C. Ct. App. 107, 109-10, 365 S.E.2d 178, 180 (1988) (record below was not clear as to whether "trial court was considering [husband's] abandonment as marital fault," which would be impermissible, or economic fault; it can be inferred from findings of fact that trial court considered abandonment only to the extent that it resulted in a dissipation of the marital home).

1. *Funds Subject to the Doctrine*

Judicial decisions in common law states seem to agree in subjecting to the dissipation doctrine any funds that could have been subject to equitable distribution at the time of an equitable distribution hearing. Thus, the dissipation doctrine has been applied not only where a spouse has dissipated property owned jointly by both parties[32] but also where the dissipated property was acquired by and kept in the sole name of the dissipating spouse.[33] The application of the dissipation doctrine to this latter category of funds poses interesting public policy questions regarding the ability of a spouse to make an unrestricted use of his own funds during the marriage. The extent of the restriction will depend upon state law regarding the scope of the doctrine and the type of expenditures or conduct constituting dissipation.

The dissipation doctrine may also extend to assets that are not subject to equitable distribution, often referred to as "nonmarital property."[34] Although

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32. *See, e.g.*, Klingberg v. Klingberg, 68 Ill. App. 3d 513, 517, 386 N.E.2d 517, 521 (1979); *Hogrebe*, 727 S.W.2d at 196-97; Bland v. Bland, 652 S.W.2d 690, 692-93 (Mo. Ct. App. 1983). Some decisions strongly indicate that the property in question was jointly owned, but do not specifically so state. *See, e.g.*, Barriger v. Barriger, 514 S.W.2d 114, 114-15 (Ky. Ct. App. 1974); Lenczycki v. Lenczycki, 152 A.D.2d 621, 624, 543 N.Y.S.2d 724, 727 (1989) (making reference to dissipation of "the family's savings").

33. *See, e.g.*, E.E.C. v. E.J.C., 457 A.2d 688, 694, 696 (Del. 1983); A.I.D. v. P.M.D., 408 A.2d 940, 941-43 (Del. 1979); *In re* Marriage of Zimmerman, 200 Ill. App. 3d 594, 596-97, 558 N.E.2d 302, 303 (1990); *In re* Marriage of Kaplan, 149 Ill. App. 3d 23, 31-32, 500 N.E.2d 612, 618 (1986); *In re* Marriage of Smith, 114 Ill. App. 3d 47, 50-51, 448 N.E.2d 545, 548 (1983); *In re* Marriage of Faulkner, 582 S.W.2d 292, 295-96 (Mo. Ct. App. 1979); Rohling v. Rohling, 379 N.W.2d 519, 521-22 (Minn. 1986); Harrell v. Harrell, 120 A.D.2d 565, 565, 502 N.Y.S.2d 57, 58-59 (1986).

34. State law often characterizes assets that are subject to equitable distribution as "marital" property. Assets that are excluded from equitable distribution are usually categorized as "nonmarital" or "separate" property. Whether assets are subject to equitable distribution varies considerably from state to state. For example, some statutes exclude from equitable distribution certain types of property, such as property acquired prior to marriage and property acquired during marriage by gift or inheritance. *E.g.*, COLO. REV. STAT. § 14-10-113(2) (introductory phrase) and § 14-10-113(2)(a) (1987); D.C. CODE ANN. § 16-910(a) (1989); FLA. STAT. § 61.075(3)(b)1, (3)(b)2 (Supp. 1990); ILL. REV. STAT. ch. 40, para. 503(a) (introductory phrase) and § 503(a)(1) (Supp. 1990); KY. REV. STAT. ANN. § 403.190(2) (introductory phrase) and § 403.190(2)(a) (Michie/Bobbs-Merrill Supp. 1988); ME. REV. STAT. ANN. tit. 19, § 722-A(2) (introductory phrase) and § 722-A(2)(A) (1981); MD. FAM. LAW CODE ANN. § 8-201(e)(2)(i), (2)(ii) (1984); MO. REV. STAT. § 452.330 sec. 2 (introductory phrase) and sec. 2(1) (Supp. 1990); N.J. REV. STAT. § 2A:34-23 (Supp. 1990); N.Y. DOM. REL. LAW § 236B(1)(d)(1) (McKinney 1986); N.C. GEN. STAT. § 50-20(b)(2) (1987); PA. CONS. STAT. ANN. tit. 23, § 401(e)(1), (3) (Purdon Supp. 1990); R.I. GEN. LAWS § 15-5-16.1(a) (1988); S.C. CODE ANN. § 20-7-473(1), (2) (Law. Co-op. Supp. 1989); TENN. CODE ANN. § 36-4-121(b)(2) (Supp. 1990); VA. CODE. ANN. § 20-107.3(A)(1)(i), (ii) (1990); W. VA. CODE § 48-2-1(f)(1), (4) (1986).

However, other statutes do not exclude this type of property from equitable distribution, although case law in a particular state may protect certain types of property (*e.g.*, property acquired by inheritance) from equitable distribution. *See, e.g.*, CONN. GEN. STAT. § 46b-81(a) (1986); HAW. REV. STAT. § 580-47(a)(3) (Supp. 1989); IND. CODE § 31-1-11.5-11(b) (Supp. 1990); KAN. STAT. ANN. § 60-1610(b)(1) (Supp. 1989); MASS. GEN. L. ANN. ch. 208, § 34 (Supp. 1990); MONT. CODE ANN. § 40-4-202(1) (1989); NEB. REV. STAT. § 42-365 (1988); N.H. REV. STAT. ANN. § 458.16-a(I) (Supp. No. 2, 1989); N.D. CENT. CODE § 14-05-24 (1981); OR. REV. STAT. § 107.105(1)(f) (1990); S.D. CODIFIED LAWS ANN. § 25-4-44 (Supp. 1989); UTAH CODE ANN. § 30-3-5(1) (1990); VT. STAT. ANN. tit. 15, § 751(a) (1990); WYO. STAT. § 20-2-114 (1987).

A few statutes create a middle ground of sorts by establishing prerequisites before there can be equitable distribution of these classes of property. *See, e.g.*, ALASKA STAT. § 25.24.160(4) (Supp. 1989) (court may divide only property acquired during coverture, except that the court may invade the property of either spouse acquired before the marriage when the balancing of the equities between the parties requires it); ARK. STAT. ANN. § 9-12-315(a)(2) (Supp. 1989) (property acquired prior to marriage "shall be returned to the party who owned it . . . unless the court shall make some other division that the court deems equitable"); IOWA CODE § 598.21(2) (1981) (court may divide inherited property or gifts received by one party if refusal to divide the property is inequitable

there are few decisions on the point,[35] some statutes specifically include as an equitable distribution factor the dissipation of property that is not subject to equitable distribution.[36] There are at least two factual situations in which the dissipation of such property could be relevant in an equitable distribution hearing. First, a spouse could dissipate his own nonmarital property, and then argue for a bigger percentage of marital property on the basis of financial need.[37] Second, a spouse could dissipate the nonmarital assets of the other spouse by, for example, through forgery, withdrawing money from a nonmarital savings account owned by the other spouse. Even without any specific statutory authorization to consider dissipation of nonmarital assets, such dissipation should be relevant.[38]

2. *Essential Scope of the Doctrine*

Although the decisions agree that all property subject to equitable distribution is subject to the dissipation doctrine, they differ substantially as to the essential scope of the doctrine. Thus, some decisions hold that a court may only consider dissipation that takes place after there has been a breakdown of the

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to the other party or to the children of the marriage); MINN. STAT. § 518.58 subd. 2 (1990) (court may award up to one-half the value of nonmarital property if it finds that either spouse's resources or property are so inadequate as to work an unfair hardship); WIS. STAT. § 767.255 (1987) (property acquired prior to or during the course of the marriage by gift or inheritance may not be divided unless "refusal to divide such property will create a hardship on the other party or on the children of the marriage").

In addition to the diversity that exists as to whether property acquired prior to marriage or by gift or inheritance is subject to equitable distribution, state law often varies considerably regarding a cut-off date after which property acquired by a spouse is no longer subject to equitable distribution. *See infra* discussion in note 42.

For a general treatment of the various statutory classifications of marital and nonmarital property, see Becker, *supra* note 1, §§ 3.03[1], [2].

35. *See In re* Marriage of Cecil, 202 Ill. App. 3d 783, 787, 560 N.E.2d 374, 379 (1990); Stallings v. Stallings, 75 Ill. App. 3d 96, 100, 393 N.E.2d 1065, 1068 (1979) (court cites, as a factor supporting award of all of the marital property to the wife, that husband had absorbed a substantial amount of the wife's nonmarital estate in his business ventures).

36. ILL. REV. STAT. ch. 40, para. 503(d)(1) (Supp. 1990) ("the contribution or dissipation of each party in the acquisition, preservation, or depreciation or appreciation in value, of the marital and nonmarital property"); TENN. CODE ANN. § 36-4-121(c)(5) (Supp. 1990) ("The contribution of each party to the acquisition, preservation, appreciation or dissipation of the marital or separate property . . .").

See also, listing dissipation as a factor and in doing so using language that can be construed as encompassing dissipation of nonmarital assets, N.Y. DOM. REL. LAW § 236B(5)(d)(11) (McKinney 1986) ("the wasteful dissipation of assets by either spouse").

37. *See In re* Marriage of Cecil, 202 Ill. App. 3d at 791, 560 N.E.2d at 379. The financial status of a party is often a factor that is required to be considered in making equitable distribution. *See supra* statutes cited in note 21. *But see* Centazzo v. Centazzo, 509 A.2d 995, 997 (R.I. 1986) (the needs of a spouse are not to be considered in making equitable distribution).

38. Such dissipation could fall under a statutory "catch all" provision or could be considered an additional "relevant" factor, in the same manner as dissipation of marital assets can be considered even though there is no specific statutory authorization. *See supra* notes 17-18 and accompanying text.

It may be argued, in opposition to the admission of evidence of dissipation of nonmarital assets, that even if a court has the power to consider additional relevant factors, the dissipation of nonmarital assets is not relevant to the distribution of existing marital assets. Instead, it may be argued, consideration of such conduct serves only to punish the dissipating spouse, and is therefore only a form of punishment for fault. Notwithstanding such an argument, however, dissipation of nonmarital assets is in fact relevant to the present economic position of the parties and how they got that way. On balance, such conduct seems more relevant than not.

If a statute specifically lists dissipation of marital assets as a factor but is silent as to the dissipation of nonmarital assets, then it may be argued that as a matter of statutory interpretation, the statute is exclusive on the subject of dissipation and does not encompass the dissipation of nonmarital assets.

marriage;[39] other decisions focus on whether property has been intentionally dissipated in order to defeat the other spouse's equitable distribution rights;[40] still others seem to focus solely on the nature of the expenditure[41] and, if the expenditure is for a prohibited purpose, find dissipation. Although these different standards will be discussed individually, at least one significant common theme unites them: each of these standards restricts to some extent the right of a spouse to deal as she feels fit with property acquired and owned solely by her. For example, assume that during the final separation of the parties, a spouse gambles away, or gives to a paramour, $50,000 of moneys "owned" by her and acquired after the parties separated and after the marriage had broken down. If under state law property acquired during a separation is subject to equitable distribution,[42] the conduct of the spouse constitutes dissipation under any of the three standards set forth above.[43] The result would be the same—*i.e.*, the $50,000 gambled or given away would be subject to the dissipation doctrine—if the funds were acquired by a spouse prior to marital breakdown but dissipated after such breakdown.

Therefore, notwithstanding the fact that in a common law state a spouse does not have an ownership interest in property owned solely by the other spouse,[44] the dissipation doctrine extends to a spouse a protectible interest in

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39. *See infra* notes 45-48 and accompanying text.

40. *See infra* notes 55-56 and accompanying text.

41. *See infra* note 58 and accompanying text.

42. State laws vary considerably regarding a cut-off date after which property acquired by a spouse is no longer subject to equitable distribution. Thus, in some states, property acquired by a spouse after separation is subject to equitable distribution and is, therefore, subject to the dissipation doctrine. *See, e.g.*, E.E.C. v. E.J.C., 457 A.2d 688, 694, 696 (Del. 1983); A.I.D. v. P.M.D., 408 A.2d 940, 941-43 (Del. 1979); *In re* Marriage of Kaplan, 149 Ill. App. 3d 23, 31-32, 500 N.E.2d 612, 618 (1986); Rohling v. Rohling, 379 N.W.2d 519, 521-22 (Minn. 1986). However, in other states, property acquired by a spouse after the final separation of the parties is not subject to equitable distribution. *See, e.g.*, N.C. GEN. STAT. § 50-20(b)(1) (1987); PA. CONS STAT. ANN. tit. 23, § 401(e)(4) (Purdon Supp. 1990); VA. CODE. ANN. § 20-107.3(A)(2) (1990); W. VA. CODE § 48-2-1(f)(5) (1986). In such states, property acquired after separation is not subject to the dissipation doctrine (unless such property was acquired with marital assets). For a comprehensive treatment of the various statutory provisions regarding cut-off dates, see Becker, *supra* note 1, § 3.03[3].

43. Of the three standards referred to, the only one that arguably might not apply is the standard that speaks in terms of an intent to deprive the other spouse of property rights. The hypothetical discussed in the text does not involve such a specific intent. Nevertheless, the equitable distribution decisions that have utilized this standard do not seem to have required a showing of specific intent and seem to have found dissipation where the conduct in question merely had the effect of reducing the property rights of the other spouse. *See infra* decisions cited in note 55.

44. Some statutes provide that each spouse has a species of common ownership of marital property. *See, e.g.*, ILL. REV. STAT. ch. 40, para. 503(e) (Supp. 1990) (interest vests at time that dissolution proceedings are commenced); MINN. STAT. § 518.54 subd. 5 (1990) (interest vests not later than date of entry of divorce decree; the extent of the vested interest is to be determined and made final by the court pursuant to the statute dealing with equitable distribution); MONT. CODE ANN. § 40-4-202(3) (1989) (interest vests immediately before date of entry of dissolution decree); N.C. GEN. STAT. § 50-20(k) (1987) (rights vest at the time of separation); OR. REV. STAT § 107.105(1)(f) (1990) (subsequent to filing a petition for dissolution, rights of the parties in the marital assets shall be a species of co-ownership); S.C. CODE ANN. § 20-7-471 (Law. Co-op. Supp. 1989) (during the marriage, a spouse acquires, based on the factors to be considered in making equitable distribution, a vested special equity and ownership right in marital property, which rights are subject to apportionment under the equitable distribution statute at the time marital litigation is commenced).

Whatever the purpose of these statutory provisions, they do not seem to create an interest that protects a spouse's right to property that has been dissipated by the other spouse. Rather, these provisions seem to have been designed to avoid the possibility of capital gains taxes on equitable property division that existed under the ruling in United States v. Davis, 370 U.S. 65 (1962). Under the *Davis* ruling, such statutes could have established that

property owned solely by the other spouse. Of course, the different formulations of the doctrine offer varying degrees of protection, and the protection is not available until an equitable distribution hearing. Nevertheless, because the doctrine permits sanctions to be imposed upon a spouse for conduct that occurred prior to the commencement of the divorce action, there is a real tension between the protection that the dissipation doctrine affords to the non-property owning spouse and the general right in a common law jurisdiction to do as one wishes with one's property. The various formulations of the dissipation doctrine permit a jurisdiction to choose the formulation that in its view best balances these competing interests. A jurisdiction most interested in protecting the right of a spouse to manage and dispose of her own property may prefer a more narrowly drawn formulation; a jurisdiction most interested in the protection of a spouse adversely affected by dissipation may prefer a broader formulation.

As has been indicated above, one formulation of the dissipation doctrine permits consideration of dissipation only when the dissipation occurs after there has been some type of marital dysfunction. Thus, in Illinois, dissipation can be considered only when it takes place at a time when the marriage is undergoing an irreconcilable breakdown.[45] Virginia intermediate courts have also adopted

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equitable property division was a partition of jointly owned property, and hence not subject to capital gains taxes. The *Davis* rule was essentially repealed by the Tax Reform Act of 1984. *See* I.R.C. § 1041 (Supp. V 1987). *See also*, Auerbach, Jenner, and Feldman, *Supplement to Historical and Practice Notes*, ILL. ANN. STAT. ch. 40, para. 503 (Smith-Hurd Supp. 1990) (discussing the Illinois provision and concluding that the provision has been rendered largely superfluous by the Tax Reform Act).

45. *In re* Marriage of O'Neill, 138 Ill. 2d 487, 497, 563 N.E.2d 494, 498-99 (1990). The issue in *O'Neill* was whether an expenditure of $15,000 for attorney fees to defend the husband against a criminal charge of attempted rape constituted dissipation. The wife had agreed to the expenditure after the husband told her that he was innocent of the charge. Subsequent to his conviction, he confessed to his wife that he had in fact committed the attempted rape. The appellate court had held that any dissipation that takes place during the marriage can be considered by a court in making equitable distribution. In so holding, the court specifically rejected other appellate court decisions which held that dissipation can only be considered if it occurred during an irreconcilable breakdown of the marriage. 185 Ill. App. 3d 566, 568-69, 541 N.E.2d 828, 830 (1989).

The Supreme Court of Illinois, over the dissent of two justices, reversed, holding that dissipation can be considered only if it occurred at a time that the marriage was undergoing an irreconcilable breakdown. The majority reasoned that the legislature, by not changing the statutory language which permitted a court to consider dissipation in response to the prior appellate court decisions that had adopted the irreconcilable breakdown requirement, had indicated its intention that the statute be construed to incorporate that requirement. 138 Ill. 2d at 497, 563 N.E.2d at 498.

The dissenting justices were of the view that since the statutory language contained no time constraint, the statutory language mandated that a court consider dissipation occurring at any time during the marriage and not merely during the irreconcilable breakdown stage. *Id.* at 500, 563 N.E.2d at 500 (Stamos, J., dissenting). The dissent also stated that even if, in spite of the absence of a time constraint, there were still a question as to the legislative intent, the statutory direction that marital property be divided "in just proportions" mandated consideration of dissipation occurring at any time during the marriage. *Id.* at 501, 563 N.E.2d at 500 (Stamos, J., dissenting).

Although not discussed by either the majority or the dissent, some Illinois authority, even prior to the appellate court's decision in *O'Neill*, seemed inconsistent with a marital breakdown requirement. *See In re* Marriage of Kaplan, 149 Ill. App. 3d 23, 32, 500 N.E.2d 612, 618 (1986) (the determinative issue is not the time when the dissipation occurred but only that the spouse used marital property for his own benefit and for a purpose unrelated to the marriage at a time when only he had access to the funds). *Cf. In re* Marriage of Lord, 125 Ill. App. 3d 1, 6, 465 N.E.2d 151, 154 (1984) (dissipation found where spouse cashed insurance policies just prior to separation); Stallings v. Stallings, 75 Ill. App. 3d 96, 100, 393 N.E.2d 1065, 1068 (1979) (dissipation apparently found where spouse lost money in bad business dealings during marriage).

this standard.[46] An Alaskan variant of this breakdown test holds that until the marriage ceases to operate as a financial unit, each party has the right to manage and control marital funds, and therefore a court may not consider alleged dissipation occurring prior to such a time in an equitable distribution proceeding.[47] In North Carolina, dissipation appears to be relevant only after a separation of the parties.[48]

Various policy reasons have been advanced for this requirement. Thus, it has been argued that without a breakdown test, every expenditure and economic decision made during the marriage can be questioned, and the courts would become auditing agencies for every failed marriage.[49] It has also been suggested that the breakdown test appropriately draws the line between, on the one hand, the right of a spouse to be protected against improper expenditures by the other spouse and, on the other hand, the right of a spouse to manage and control property owned solely by that spouse.[50] However, whatever advantages the test may afford[51] seem greatly outweighed by its disadvantages. First, where the

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46. Clements v. Clements, 10 Va. App. 580, 586, 397 S.E.2d 257, 261 (1990); Booth v. Booth, 7 Va. App. 22, 27, 371 S.E.2d 569, 572 (1988) (expenditure "in anticipation of divorce or separation for a purpose unrelated to the marriage and in derogation of the marital relationship at a time when the marriage is in jeopardy"). The *Booth* court relied on *In re* Marriage of Smith, 114 Ill. App. 3d 47, 448 N.E.2d 545 (1983).

47. *See* Streb v. Streb, 774 P.2d 798, 802 (Alaska 1989). *See also* Hartland v. Hartland, 777 P.2d 636, 642, n.6 (Alaska 1989).

48. *See* N.C. GEN. STAT. § 50-20(c)(11a) (1987) (listing as a factor to be considered in making equitable distribution, "[a]cts of either party . . . to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of distribution").

49. *See In re* Marriage of Getautas, 189 Ill. App. 3d 148, 154, 544 N.E.2d 1284, 1288 (1989). In *Getautas*, the court also decided that since, under Illinois law, "a person charged with dissipation . . . [must] establish by clear and specific evidence how the funds were spent," a breakdown standard was necessary to prevent a spouse from having to keep records of all expenditures from the first day of the marriage. 189 Ill. App. 3d at 154, 544 N.E.2d at 1288. *Getautas*, however, was decided prior to the Illinois Supreme Court's decision in *In re* Marriage of O'Neill, 138 Ill. 487, 563 N.E.2d 494 (1990). The burden of proof in dissipation cases is discussed *infra* at notes 89-93 and accompanying text.

Cf. Panhorst v. Panhorst, 301 S.C. 100, 390 S.E.2d 376 (Ct. App. 1990). The *Panhorst* court held, interpreting a statute, that property allegedly given by a spouse to his mother was not subject to equitable distribution because the property was not owned by a party when marital litigation commenced. (The court's opinion does not exclude consideration of dissipation as a factor, but it does exclude distribution of dissipated property not owned at the time of commencement of litigation.) The court stated:

> By requiring the estate to be identified as of the date marital litigation is filed, the Legislature has elected to foreclose the spouses from litigating every expenditure or transfer of property during the marriage. One spouse or the other may have spent marital funds foolishly or selfishly or may have invested them unprofitably. The statute wisely prevents the other spouse from resurrecting these transactions at the end of the marriage to gain an advantage in the equitable distribution. Were it to do otherwise, human greed and vindictiveness would transform the courts into "auditing agencies for every marriage that falters."

390 S.E.2d at 379.

50. *See* Booth v. Booth, 7 Va. App. 22, 27-28, 371 S.E.2d 569, 572 (1988), which states, after adopting the breakdown test:

> To allow one spouse to squander marital property is to make an equitable award impossible. . . . On the other hand, at least until the parties contemplate divorce, each is free to spend marital funds. To decide a question of dissipation of marital assets, we must accommodate these conflicting interests in the marital estate.

51. The advantages of the test are, arguably, relatively minor. For example, the contention that the marital breakdown requirement prevents every expenditure from being placed in issue seems hyperbolic—courts can distinguish between real and false issues and are competent to decide close questions of fact. *See, e.g.*, Cooksey v. Cooksey, 280 S.C. 347, 351-52, 312 S.E.2d 581, 585 (Ct. App. 1984) (trial court erred in refusing to consider, on the ground that the parties were living together and had not separated at the time of the transfers, one spouse's contention that the other spouse had secreted jointly owned marital funds in anticipation of divorce; the very

standard is couched in the "irreconciliable breakdown of marriage" terminology, difficulties arise. Determining after the event whether a marriage was "irreconciliably broken" at the precise time of the dissipating conduct can be a difficult question, especially considering the separations and reconciliations that often attend a marriage that is breaking apart.[52] This difficulty can be compounded by the fact that in some of these cases it is difficult to know when the dissipation occurred—all that the injured spouse knows and can prove is that property disappeared somewhere between two points in time.[53] Thus, the burden of proving that the dissipation occurred subsequent to the matrimonial breakdown may be extremely, and unfairly, difficult in some cases. More importantly, the marital breakdown and equivalent standards afford unduly narrow protection to the spouse who is the victim of dissipating conduct by eliminating protection against dissipation which occurs prior to marital breakdown. Under these standards, dissipation which takes place prior to marital breakdown is not remediable in equitable distribution, even where the dissipated property consisted of property jointly owned by both spouses.[54]

Another formulation of the dissipation doctrine permits a finding of dissipation where property has been intentionally dissipated with a view toward defeating the other spouse's equitable distribution rights upon divorce.[55] This

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purpose of a court is to decide disputed issues of fact). Moreover, the role of consent or acquiescence as a bar would also prevent every expenditure from being contested. For a discussion of consent, see *infra* text accompanying notes 87-88 & 160-62.

52. The Illinois decisions adopting the irreconcilable breakdown standard indicate that whether or not an irreconcilable breakdown existed at the time of the dissipation is a factual question. Thus, it has been held that breakdown can take place before the commencement of the dissolution action, *see In re* Marriage of Partyka, 158 Ill. App. 3d 545, 549, 511 N.E.2d 676, 680 (1987); *In re* Marriage of Smith, 128 Ill. App. 3d 1017, 1019, 471 N.E.2d 1008, 1011 (1984), or even prior to a separation of the parties, *see In re* Marriage of Harding, 189 Ill. App. 3d 663, 676, 545 N.E.2d 459, 467 (1989); *In re* Marriage of Rai, 189 Ill. App. 3d 559, 565, 545 N.E.2d 446, 449 (1989); *In re* Marriage of Hellwig, 100 Ill. App. 3d 452, 462, 426 N.E.2d 1087, 1094 (1981).

Determining retrospectively whether a marriage was irreconcilably broken down at the time of the dissipating conduct, considering all of the varying factual circumstances that can characterize a failing marriage including separations and reconciliations, can be quite difficult. *See, e.g.*, *Harding*, 189 Ill. App. 3d at 676, 545 N.E.2d at 467 ("although trial court suggested . . . [that] the irreconciliable breakdown occurred at the point at which [one spouse] stopped cooking for" the other, there was no evidence of a breakdown until the dissolution action was commenced); *Rai*, 189 Ill. App. 3d at 565, 545 N.E.2d at 450 ("strong evidence was presented that the marriage began breaking down in 1976," apparently prior to the parties' separation); *In re* Marriage of Adams, 183 Ill. App. 3d 296, 303, 538 N.E.2d 1286, 1291 (1989) (marital breakdown began when spouse began frequenting bars).

A standard, such as North Carolina's which requires a separation of the parties before there can be dissipation does not seem to pose the same difficulties as the marital breakdown standard, as the essential factual questions are less complicated. N.C. GEN. STAT. § 50-20(c) (1987).

53. *See, e.g.*, E.E.C. v. E.J.C., 457 A.2d 688, 694 (Del. 1983); *In re* Marriage of Petrovich, 154 Ill. App. 3d 881, 886-87, 507 N.E.2d 207, 210, *appeal denied*, 116 Ill. 2d 556, 515 N.E.2d 125 (1987); *In re* Marriage of Smith, 128 Ill. App. 3d 1017, 1022-24, 471 N.E.2d 1008, 1013-15 (1984); *In re* Marriage of Faulkner, 582 S.W.2d 292, 295 (Mo. Ct. App. 1979).

54. For further discussion of the marital breakdown and other standards which define the essential scope of the dissipation doctrine, see *infra* Part V. SUGGESTED ANALYSIS.

55. *See, e.g.*, Robinette v. Robinette, 736 S.W.2d 351, 354 (Ky. Ct. App. 1987) (dissipation consists of spending funds for a nonmarital purpose when there is a separation or dissolution impending and there is a clear showing of intent to deprive one spouse of his or her proper share of the marital property); Rosenberg v. Rosenberg, 64 Md. App. 487, 502, 497 A.2d 485, 492, *cert. denied*, 305 Md. 107, 501 A.2d 845 (1985); Sharp v. Sharp, 58 Md. App. 386, 399, 473 A.2d 499, 505, *cert. denied*, 300 Md. 795, 481 A.2d 240 (1984); Rundell v. Rundell, 423 N.W.2d 77, 82 (Minn. Ct. App. 1988); Griepp v. Griepp, 381 N.W.2d 865, 869 (Minn. Ct. App. 1986).

test does not necessarily insulate a spouse's conduct if that conduct occurs prior to separation or breakdown.[56] However, the key to applying the standard, and the chief difficulty with the standard, is the definitional issue: What is the meaning of the requirement that there must be a showing of intent to avoid the property distribution rights of the other spouse? Intent can be interpreted to require the showing of specific intent or it can be interpreted to be satisfied with merely a generalized showing that a spouse intended to engage in a transaction which had the effect of reducing the other spouse's equitable distribution rights. If specific intent is required, must the intent be solely to exclude the rights of the other spouse, or is it sufficient if conduct is only partially motivated by such conduct? Suppose, for example, that after the final separation of the spouses one spouse makes a gift or loan to a relative out of property separately owned by the donor spouse but subject to equitable distribution. Or suppose that prior to a final separation one spouse uses jointly owned funds to purchase an expensive gift for a paramour or loses a large sum of jointly owned funds in gambling activities. Must a court, in order for the dissipation doctrine to apply, find a specific intent to deprive the other spouse of equitable distribution rights in the event of a divorce? Must the court find that the expending spouse has as his sole intent to deprive the other spouse of property rights? Such requirements would greatly weaken the protection afforded by the dissipation doctrine. The few equitable distribution decisions that have utilized a standard that speaks in terms of intent have not discussed these issues. Intent to deprive the other spouse of rights has proven unsatisfactory as a hallmark in an analagous area of domestic relations law,[57] and it is an unsatisfactory model here.

A still different formulation of the dissipation doctrine appears to focus only on the nature of the expenditure in question, without any other apparent restriction. Jurisdictions that adopt this formulation impose neither a requirement that the transaction be intended to defeat the property rights of the other

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56. Since the test focuses on the intent of the actor, conduct motivated by the requisite intent would constitute dissipation, whether or not the parties were separated and whether or not the marriage was irreconcilably broken at the time of the conduct. *Cf.* Cooksey v. Cooksey, 280 S.C. 347, 351-52, 312 S.E.2d 581, 585 (Ct. App. 1984) (trial court erred in refusing to consider, on the ground that the parties were living together and had not separated at the time of the transfers, one spouse's contention that the other spouse had secreted jointly owned marital funds in anticipation of divorce; dissipation terminology not used in the decision).

57. The analogy is to the law concerning validity of a transfer which deprives a spouse of property rights that would have existed upon the death of the transferor. Some courts utilized a standard turning on the intent of the transferor in decisions dealing with this issue. Of these decisions, one study concluded that "the very elusiveness of the 'intent' concept has led most of the jurisdictions normally using that rationale to adopt a test that in practice pays more attention to the equities of the case . . . ." W. MACDONALD, FRAUD ON THE WIDOW'S SHARE 98 (1960). The same study also concluded:

> When the sole criterion is "intent," with no avowed enquiry into the objective manifestations of that "intent," the test is unsatisfactory. . . . We are told that "the devil himself knoweth not the mind of man." The task is even more difficult for the secular observer.

Id. at 117.

Other courts rejected intent of the transferor as the standard and instead used other tests. *See, e.g.*, Newman v. Dore, 275 N.Y. 371, 378-80, 9 N.E.2d 966, 968 (1937). The problem is now resolved in some jurisdictions by statutory provisions that, like the Uniform Probate Code, permit a surviving spouse's share of a decedent's estate to include not only property passing from a decedent by will or intestacy but also property transferred by a decedent during her lifetime. *See* UNIFORM PROBATE CODE §§ 2-201, 2-202, 8 U.L.A. 74-76 (1983). *See generally* Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981 (1977).

spouse, nor a requirement that the transaction take place after an irreconcilable breakdown of marriage.[58] This approach, by making subject to the dissipation doctrine any dissipation no matter when it occurs, is the most protective of the spouse contending dissipation. Arguably, this high degree of protection is warranted in order to best effectuate a significant purpose of equitable distribution: to recognize and give credit for the role of the spouses in the accumulation of property over the course of the marriage.[59]

3. *Expenditures and Conduct Constituting Dissipation*

Once a jurisdiction determines whether to place any restriction on the essential scope of the dissipation doctrine, courts must define, more precisely than they have done heretofore, what expenditures and conduct constitute dissipation. One general definition is that dissipation occurs when one spouse uses property subject to equitable distribution for his or her own benefit for a purpose unrelated to the marriage.[60] Although this definition is clear enough to resolve the garden variety cases that arise dealing with the propriety of particular expenditures, the definition is too narrowly phrased to resolve many of the issues that have arisen. In other jurisdictions, the courts have not used any specific definition to describe the type of expenditure that constitutes dissipation

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58. Thus, some courts have utilized a dissipation analysis without indicating any limitation upon the scope of the dissipation doctrine. *See, e.g.*, Stutz v. Stutz, 556 N.E.2d. 1346, 1349 (Ind. Ct. App. 1990). Because these decisions do not actually reject (or even discuss) any limitation, they cannot be characterized as unequivocally representing a dissipation doctrine which does not contain any restrictions on its fundamental scope. Nevertheless, the existence of a number of such decisions in a particular jurisdiction tends to indicate that the jurisdiction has adopted an unrestricted formulation. Thus, Missouri decisions have applied either a "dissipation" doctrine or a similar "reimbursement" concept without indicating any limitation on the scope of those doctrines. *See, e.g.*, Missouri decisions cited *supra* in note 12; Dove v. Dove, 773 S.W.2d 871, 873 (Mo. Ct. App. 1989) (award by trial court of a large percentage of marital assets to spouse affirmed "[u]nder these particular facts," which included facts that "[d]uring the marriage" the other spouse loaned $11,500 to her children which was never repaid, and withdrew $14,000 from joint accounts). Similarly, New York and Wisconsin decisions apply a dissipation analysis without any indication of a limitation on the scope of that analysis. *See, e.g.*, Lenczycki v. Lenczycki, 152 A.D.2d 621, 624, 543 N.Y.S.2d 724, 727 (1989) (spouse dissipated approximately $135,000 of "the family's savings" during a three year period); Harrell v. Harrell, 120 A.D.2d 565, 566, 502 N.Y.S.2d 57, 58-59 (1986); Willis v. Willis, 107 A.D.2d 867, 868, 484 N.Y.S.2d 309, 310 (1985); Hauge v. Hauge, 145 Wis. 2d 600, 603-05, 427 N.W.2d 154, 155-56 (1988); Anstutz v. Anstutz, 112 Wis. 2d 10, 12-13, 331 N.W.2d 844, 846 (1983); Haack v. Haack, 149 Wis. 2d 243, 253-54, 440 N.W.2d 794, 798-99 (Ct. App. 1989), *rev. denied*, 443 N.W.2d 310 (1989). Similar decisions exist in other jurisdictions. *See, e.g.*, *In re* Marriage of Paulsen, 677 P.2d 1389, 1390 (Colo. Ct. App. 1984).

In this connection, note that statutory provisions that mandate the consideration of dissipation do not, with the exception of the North Carolina statute, contain any time constraints imposing an irreconcilable breakdown requirement. *See supra* statutes cited in notes 14 & 15. Such provisions may ultimately be construed in accordance with their plain language to mandate consideration of dissipation occurring at any time during the marriage.

59. *See supra* discussion in note 21 and accompanying text.

60. This definition has been utilized primarily in Illinois. *See, e.g.*, *In re* Marriage of O'Neill, 138 Ill. 2d 487, 497, 563 N.E.2d 494, 498-99 (1990); *In re* Marriage of Rai, 189 Ill. App. 3d 559, 565, 545 N.E.2d 446, 449 (1989); *In re* Marriage of Getautas, 189 Ill. App. 3d 148, 152, 544 N.E.2d 1284, 1286 (1989); *In re* Marriage of Partyka, 158 Ill. App. 3d 545, 549, 511 N.E.2d 676, 680 (1987); *In re* Marriage of Randall, 157 Ill. App. 3d 892, 897, 510 N.E.2d 1153, 1157, *appeal denied*, 116 Ill. 2d 556, 515 N.E.2d 105 (1987).

However, two intermediate Virginia courts also appear to have adopted this definition. *See* Clements v. Clements, 10 Va. App. 580, 586, 397 S.E.2d 257, 261 (1990); Booth v. Booth, 7 Va. App. 22, 27, 371 S.E.2d 569, 572 (1988).

Cf. Siegel v. Siegel, 241 N.J. Super. 12, 13, 574 A.2d 54, 55 (1990).

but instead seem to approach the issue of the propriety of an expenditure on an ad hoc basis.[61] The result is often confusion and inconsistency regarding the various categories of expenditures. For example, there has not been substantial agreement as to whether dissipation results when a spouse intentionally or negligently acts or fails to act in a way that results in no particular benefit to the spouse but reduces the value of the marital estate. Thus, although some decisions have held that a failure to make mortgage payments that results in foreclosure constitutes dissipation,[62] courts have not agreed as to whether refusal to sign joint tax returns that results in increased taxes constitutes dissipation,[63] nor have they agreed as to whether the incurrence of losses in business operations constitutes dissipation.[64] In dealing with these issues, courts have not distinguished between intentional and negligent acts, and such a distinction seems undesirable.[65]

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61. *See, e.g.*, Gruver v. Gruver, 372 Pa. Super. 194, 200, 539 A.2d 395, 398, *appeal denied*, 520 Pa. 605, 553 A.2d 968 (1988) (refusal to sign joint return held to have resulted in dissipation of marital property; no discussion of authority).

62. *In re* Marriage of Jones, 187 Ill. App. 3d 206, 232-33, 543 N.E.2d 119, 137-38 (1989); *In re* Marriage of Aslaksen, 148 Ill. App. 3d 784, 788-89, 500 N.E.2d 91, 94-95 (1986); *In re* Marriage of Siegel, 123 Ill. App. 3d 710, 719, 463 N.E.2d 773, 780-81 (1984); *In re* Marriage of Cook, 117 Ill. App. 3d 844, 853, 453 N.E.2d 1357, 1364-65 (1983). *See also*, not using the "dissipation" terminology, Heins v. Heins, 783 S.W.2d 481, 484-85 (Mo. Ct. App. 1990).

63. *Compare* Gruver v. Gruver, 372 Pa. Super. 194, 200, 539 A.2d 395, 398, *appeal denied*, 520 Pa. 605, 553 A.2d 968 (1988) (refusal to sign joint return held to have resulted in dissipation of marital property; no discussion of authority) *with* Hunsinger v. Hunsinger, 381 Pa. Super. 453, 464-65, 554 A.2d 89, 95 (1989) (spouse not entitled to credit for higher tax payment caused by other spouse's refusal to file joint tax return; term "dissipation" not used) *and* Hedelius v. Hedelius, 361 N.W.2d 421, 424 (Minn. Ct. App. 1985) (contention that spouse's refusal to cooperate in signing a joint tax return constituted dissipation to the extent of the tax differential held to be too speculative).

64. *Compare In re* Marriage of Holt, 97 Or. App. 192, 198, 776 P.2d 7, 10 (1989) (depletion in investment account because of stock market fluctuations cannot be charged against the spouse who managed the account; opinion does not use the term "dissipation") *and* Hauge v. Hauge, 145 Wis. 2d 600, 603-05, 427 N.W.2d 154, 155-56 (Wis. Ct. App. 1988) *with* Booth v. Booth, 7 Va. App. 22, 28, 371 S.E.2d 569, 573 (1988) (funds lost in a speculative venture held by trial court to constitute "waste") *and* Stallings v. Stallings, 75 Ill. App. 3d 96, 100, 393 N.E.2d 1065, 1067-68 (1979) (seemingly treating as dissipation spouse's loss of other spouse's nonmarital assets in business misadventures).

See also In re Marriage of Petrovich, 154 Ill. App. 3d 881, 886, 507 N.E.2d 207, 209-10 (1987) (dissipation found where investment account dwindled from $2,000,000 to somewhere between $14,000 and $20,000 at the time of trial; court states that dissipation need not be for a personal benefit, thus suggesting that spouse's mismanagement constituted dissipation, but decision can also be read as finding that manager-spouse's explanation for the disappearance of the account in question was inadequate); *In re* Marriage of Lippert, 192 Mont. 222, 227-28, 627 P.2d 1206, 1207-09 (1981) (husband left marital home with wife's consent to establish a business for family elsewhere; after husband left the home he admittedly expended $96,000 in marital assets, which he contended were lost in a business venture; the supreme court vacated an award to the wife of one-half of the expended amount, partly on the ground that the trial court had ignored the principle that each spouse had the power to freely contract with others regarding the marital property, and that even though husband had used poor judgment in his business transactions he lawfully possessed the power to deal with the property). *Lippert* was subsequently explained in *In re* Marriage of Hunter, 196 Mont. 235, 238-39, 639 P.2d 489, 491 (1982).

65. Few cases have raised the issue. In Anstutz v. Anstutz, 112 Wis. 2d 10, 12-13, 331 N.W.2d 844, 846 (Wis. Ct. App. 1983), the court stated that a party's financial contribution to marriage may be offset by, *inter alia*, his negligent or intentional destruction of major assets by fire or by accident. But in *In re* Marriage of Click, 169 Ill. App. 3d 48, 55, 523 N.E.2d 169, 174, *appeal denied*, 122 Ill. 2d 571, 530 N.E.2d 241 (1988), in which a spouse, in violation of a court order, took a motorcycle that was later destroyed in an accident, the court held that although dissipation can be found where the conduct conferred no personal benefit, dissipation cannot be found where the conduct was detrimental to both parties and unintentional as well.

It seems undesirable to hold that negligent conduct cannot constitute dissipation. If conduct of one spouse has a negative impact on the property rights of the other spouse, and if such conduct otherwise constitutes dissipation,

Expenditures for various living expenses have also produced some division in the decisions. Again, an analytical framework that seeks to determine whether these type of expenditures are for the sole benefit of the expending spouse is not always helpful in analyzing whether these expenditures should be subject to the dissipation doctrine. For example, expenditures by a spouse from funds subject to equitable distribution made for that spouse's reasonable living expenses arguably involve a personal benefit, but such expenditures are usually not treated as constituting dissipation,[66] although there is authority to the contrary.[67] Neither the decisions sustaining or disallowing claims of dissipation explain their rationale regarding the personal benefit rule. Where decisions apply the majority rule permitting reasonable living expenses, permissible expenses encompass expenditures for household items, repairs, automobile or medical insurance, and other expenses of everyday living.[68] Expenditures which exceed a normal range may be disallowed.[69] There appears to be general agreement that use of marital funds for gambling or excessive drinking constitutes dissipation and is not protected by the rule insulating normal living expenses,[70] and substantial agreement that the use of marital funds for the payment of legal fees for services rendered to the expending spouse constitutes dissipation.[71] Decisions

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then it should be considered, whether or not intentional. A defense of lack of intent may encourage perjury and would unduly weaken the protections supplied by the dissipation doctrine. *Cf.* note 57 *supra* and accompanying text.

66. *See, e.g., In re* Marriage of Randall, 157 Ill. App. 3d 892, 897, 510 N.E.2d 1153, 1157 (1987); *In re* Marriage of Sevon, 117 Ill. App. 3d 313, 317, 453 N.E.2d 866, 869 (1983); March v. March, 435 N.W.2d 569, 572 (Minn. Ct. App. 1989); Volesky v. Volesky, 412 N.W.2d 750, 752 (Minn. Ct. App. 1987); Clements v. Clements, 10 Va. App. 580, 586, 397 S.E.2d 257, 261 (1990); Booth v. Booth, 7 Va. App. 22, 28, 371 S.E.2d 569, 573 (1988).

67. *See In re* Marriage of Harding, 189 Ill. App. 3d 663, 678, 545 N.E.2d 459, 468 (1989) (use of marital property to secure housing after leaving the marital home constitutes dissipation); *In re* Marriage of Partyka, 158 Ill. App. 3d 545, 552-54, 511 N.E.2d 676, 682-83 (1987) (spouse's expenditures for, *inter alia*, rent on his apartment, utilities, and household appliances and furnishings constituted dissipation); Parsons v. Parsons, 68 Wis. 2d 744, 750-52, 229 N.W.2d 629, 632-33 (1975) (spouse charged with expenditures for purchase of automobile and of furnishings for his apartment).

68. *See, e.g., In re* Marriage of Getautas, 189 Ill. App. 3d 148, 155, 544 N.E.2d 1284, 1288 (1989) (expenditures for household items, repairs, and entertainment); Volesky v. Volesky, 412 N.W.2d 750, 752 (Minn. Ct. App. 1987) (expenditures for support payments, automobile insurance, medical insurance, taxes on land).

69. *See, e.g.*, Hartland v. Hartland, 777 P.2d 636, 642 (Alaska 1989); A.I.D. v. P.M.D., 408 A.2d 940, 941-43 (Del. 1979); Barriger v. Barriger, 514 S.W.2d 114, 114-15 (Ky. Ct. App. 1974). *Cf.* Hogrebe v. Hogrebe, 727 S.W.2d 193, 197 (Mo. Ct. App. 1987) (spouse's "reasonable living expenses," as determined by the court, deducted from amount of dissipated funds).

70. As to gambling, see, for example, Smith v. Smith, 114 Ill. App. 3d 47, 51-52, 448 N.E.2d 545, 548 (1983); *Barriger*, 514 S.W.2d at 115; Anstutz v. Anstutz, 112 Wis. 2d 10, 12-13, 331 N.W.2d 844, 846 (1983). *Cf.* Siegel v. Siegel, 241 N.J. Super. 12, 574 A.2d 54 (1990).

There are fewer decisions dealing with excessive drinking than with gambling, but they seem to indicate that use of marital funds to pay for excessive drinking is not a proper living expense and constitutes dissipation. *See Anstutz*, 112 Wis. 2d at 12-13, 331 N.W.2d at 846. *See also In re* Marriage of Clark, 13 Wash. App. 805, 807-09, 538 P.2d 145, 146-47 (1975); although Washington is a community property jurisdiction, the issue regarding the propriety of this type of expenditure is the same as in a common law jurisdiction. *Cf. In re* Marriage of Adams, 183 Ill. App. 3d 296, 303, 538 N.E.2d 1286, 1291 (1989) (wife alleged that husband misspent on alcohol a portion of his wages each week; however, no dissipation found since husband testified that the money was spent on cigarettes, beer, and tips, and since only $4986 to $6086 of his wages were not entirely accounted for over a two-year period).

71. For holdings that use for payment of legal fees constitutes dissipation, see Head v. Head, 168 Ill. App. 3d 697, 702-03, 523 N.E.2d 17, 21 (1988); *In re* Marriage of Schriner, 88 Ill. App. 3d 380, 385, 410 N.E.2d 572, 576 (1980); *Barriger*, 514 S.W.2d at 115; Hortis v. Hortis, 367 N.W.2d 633, 636-37 (Minn. Ct. App. 1985).

involving the expenditure of funds on expensive hobbies usually have not resulted in a finding of dissipation.[72] One factor tending to militate against a finding of dissipation in such cases is that the other spouse has frequently consented to the expenditure.[73] Courts have disagreed as to whether an expenditure by a spouse for a trip with the children of the parties constitutes dissipation.[74] One might expect similar disagreement as to whether an expenditure by a spouse for that spouse's vacation trip alone constitutes dissipation.[75]

Although expenditures by one spouse to pay for living expenses for the other spouse or for the children of the parties do not normally involve a personal benefit,[76] on occasion such expenditures have been held to be impermissible.[77] Decisions which disallow such expenditures may proceed on the premise that, where the spending spouse has the *responsibility* for paying for support, use of funds subject to equitable distribution may confer an inappropriate benefit upon the spending spouse.[78]

Expenditures for gifts and non-business loans, made from funds that are subject to equitable distribution without the knowledge or consent of the other spouse, pose interesting issues. Such expenditures do not confer any benefit upon the other spouse, and often the recipient of the gift or loan is a child or other relative of the transferor or is a person who appears to be having a romantic relationship with the transferor. Courts have held that gifts by one spouse to a third party made from assets subject to equitable distribution constitute dis-

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But see Booth v. Booth, 7 Va. App. 22, 28-29, 371 S.E.2d 569, 573 (1988) (expenditure of funds for counsel fees not waste, but use of marital funds to pay excessive counsel fees may be found to constitute waste).

72. *See In re* Marriage of Reeser, 97 Ill. App. 3d 838, 841, 424 N.E.2d 45, 48 (1981); Willis v. Willis, 107 A.D.2d 867, 868, 484 N.Y.S.2d 309, 310 (1985). *Cf. In re* Marriage of Stice, 308 Or. 316, 328-29, 779 P.2d 1020, 1027 (1989).

73. *See Willis*, 107 A.D.2d at 868, 484 N.Y.S.2d at 310. *Cf. In re* Marriage of Reeser, 97 Ill. App. 3d at 841, 424 N.E.2d at 48 (no testimony that spouse did not enjoy or otherwise participate in the other spouse's racing hobby). For a discussion of the role of consent or acquiescence, see *infra* Part V. SUGGESTED ANALYSIS.

74. *Compare In re* Marriage of Ryman, 172 Ill. App. 3d 599, 608, 527 N.E.2d 18, 23-24 (1988) (dissipation found) *with* Griepp v. Griepp, 381 N.W.2d 865, 869 (Minn. Ct. App. 1986) (no dissipation).

75. *See* Dean v. Dean, 87 Wis. 2d 854, 869, 275 N.W.2d 902, 909 (1979) (trial court may permit expenditures for yearly vacations, although amount expended is subject to review for reasonableness; term "dissipation" not used).

76. For examples of courts refusing to hold that such expenditures constituted dissipation, see *In re* Marriage of Getautas, 189 Ill. App. 3d 148, 155, 544 N.E.2d 1284, 1288 (1989); *Griepp*, 381 N.W.2d at 869.

77. *See*, although not using the term "dissipation," Weiss v. Weiss, 226 N.J. Super. 281, 291, 543 A.2d 1062, 1067 (App. Div.), *cert. denied*, 114 N.J. 287, 554 A.2d 844 (1988); *In re* Marriage of Holt, 97 Or. App. 192, 198, 776 P.2d 7, 10 (1989); Grandovic v. Grandovic, 387 Pa. Super. 619, 627-28, 564 A.2d 960, 963-64 (1989).

78. The three decisions cited in note 77 *supra* seem to support this proposition. In *Grandovic*, a spouse used marital assets—investment accounts opened with money that he had received from a lump sum distribution of his pension—to pay a tax deficiency owed by both spouses and to reimburse himself for college expenses for the parties' children. 387 Pa. Super. at 625, 564 A.2d at 963. The court held that since the tax debt arose after separation (and hence under Pennsylvania law was a joint but not a marital obligation), the use of the marital funds to pay the tax debt conferred a disproportionate benefit upon the payor spouse. *Id.* at 626-27, 564 A.2d at 963-64. Similarly, the court held that since the payor spouse would have been principally liable for the payment of the college expenses, the payment of these expenses from marital assets was an impermissible use primarily for his benefit. *Id.* at 627-28, 564 A.2d at 964. In both *Weiss* and *In re Marriage of Holt* the opinions indicate, but certainly do not explicitly state, that the payments at issue were made to comply with a previously existing support order against the expending spouse. *Weiss*, 226 N.J. Super. at 291, 543 A.2d at 1067; *In re* Marriage of Holt, 97 Or. App. at 198, 776 P.2d at 10.

sipation,[79] although some decisions are to the contrary.[80] Nonetheless, one may argue legitimately that a spouse should have the right to make reasonable gifts, at least from separately owned, although still subject to equitable distribution, funds.[81] A non-business loan (*e.g.*, a non-interest bearing loan to a relative) is in some respects similar to a gift. However, one key difference between a loan and a gift is the repayment obligation of the loan. Thus, where a loan is concerned, the primary question upon equitable distribution is whether to apportion the repayment obligation between the spouses or whether to simply assign the repayment obligation to the lending spouse. In the case of such a loan, it seems fairest to assign the repayment obligation to the lending spouse as part of that spouse's share of marital property,[82] because to do otherwise puts the risk of default upon the other spouse. At least one court has held that the foregone interest on an interest-free loan represents an amount dissipated.[83]

In a factually related area, questions involving dissipation or diminution of assets occasionally arise in connection with an asserted debt to a relative that is unpaid at the time of the equitable distribution hearing, or the prior transfer of funds to a relative in what was assertedly repayment of a debt. Where debts to a relative are outstanding at the time of the hearing, decisions have allocated debts incurred for nonmarital purposes as well as debts of a dubious existence or of a moral rather than a legal obligation to the spouse who incurred the

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79. *See, e.g., In re* Marriage of Zimmerman, 200 Ill. App. 3d 594, 596, 558 N.E.2d 302, 303 (1990); *In re* Marriage of Kaplan, 149 Ill. App. 3d 23, 32, 500 N.E.2d 612, 618-19 (1986) (gift to friend of opposite sex); Robinette v. Robinette, 736 S.W.2d 351, 354 (Ky. Ct. App. 1987) (although gifts to family members can constitute dissipation, in this marriage charity was a marital enterprise in view of evidence of financial assistance to family members); Rosenberg v. Rosenberg, 64 Md. App. 487, 502-03, 497 A.2d 485, 492, *cert. denied*, 305 Md. 107, 501 A.2d 845 (1985) ("cash advance" to friend of opposite sex). *See also*, not using the term "dissipation," Ahlo v. Ahlo, 1 Haw. App. 324, 329, 619 P.2d 112, 117 (1980) (spouse irrevocably transferred cash to parties' adult children); Karr v. Karr, 192 Mont. 388, 407-08, 628 P.2d 267, 278 (1981), *cert. denied*, 455 U.S. 1016 (1982) (funds withdrawn from bank account and placed in a certificate of deposit in names of parties' children). *Cf.* Huckabee v. Huckabee, 544 So.2d 170, 172 (Ala. Civ. App. 1989) (gift transfers to spouse's daughter held void in view of spouse's testimony that gifts were an attempt to divest other spouse of her interest in these assets).

In Brooks v. Brooks, 733 P.2d 1044 (Alaska 1987), the court adopted the restriction on gifts contained in the Uniform Marital Property Act. *See infra* text accompanying notes 133-35.

In some instances, a purported transfer of marital assets may be treated as illusory, with the property remaining subject to equitable distribution. *See, e.g.*, Lynch v. Lynch, 147 Vt. 574, 576-77, 522 A.2d 234, 236 (1987) (property in a trust created by a spouse who retained a power of revocation held subject to equitable distribution). In such an event, there is no need for the dissipation doctrine, because the dissipation doctrine only is called into play if the transfer is in all respects complete and irrevocable.

80. *See In re* Marriage of Glessner, 119 Ill. App. 3d 306, 316, 456 N.E.2d 311, 318 (1983). *See also*, not using the term "dissipation," *In re* Marriage of Gebhardt, 240 Mont. 165, 174, 783 P.2d 400, 405 (1989); *In re* Marriage of McGoldrick, 85 Or. App. 412, 416-17, 736 P.2d 622, 624, *rev. denied*, 304 Or. 55, 742 P.2d 1186 (1987).

81. *See infra* Part V. SUGGESTED ANALYSIS.

82. *See* Willis v. Willis, 107 A.D.2d 867, 868, 484 N.Y.S.2d 309, 311 (1985) (spouse's transfer of $10,000 to his son for use as collateral for a loan was properly considered marital property; funds came from father's payroll savings and after repayment of loan will be returned to him). *Cf.* Head v. Head, 168 Ill. App. 3d 697, 703, 523 N.E.2d 17, 21 (1988) (transfer of $6,000 to spouse's brother, whether viewed as a gift or a loan, constituted dissipation).

83. Rosenberg v. Rosenberg, 64 Md. App. 487, 503-04, 497 A.2d 485, 493, *cert. denied*, 305 Md. 107, 501 A.2d 845 (1985).

debt.[84] Where funds were previously transferred in what was asserted to be payment of the debt, courts have used a dissipation or diminution analysis.[85]

4. *Relevance of Consent or Acquiescence*

The decisions usually do not discuss the role of consent by the other spouse, probably because the other spouse rarely seems to have had advance knowledge of the expenditure in question. Whether consent is a defense is a question more likely to arise in a jurisdiction which rejects the marital breakdown concept than in a jurisdiction which accepts the marital breakdown limitation. (In a jurisdiction which accepts the marital breakdown requirement, only expenditures which occur after breakdown can constitute dissipation. Therefore, in such a jurisdiction consent can only be an issue if a spouse consents to an expenditure which takes place subsequent to breakdown. However, in view of the adversary relationship which often prevails once a marriage has broken down, consent is far less likely to take place following breakdown.) For analytical purposes, consent may be broken down into express or implied consent given in advance of or contemporaneously with an expenditure, and acquiescence without protest following an expenditure. Most of the few decisions on the point seem to treat express or implied consent given in advance of or contemporaneously with an expenditure as a defense.[86] However, at least one decision has indicated that passive assent or agreement in an expenditure without protest, does not necessa-

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84. *See* Wolter v. Wolter, 395 N.W.2d 417, 421-22 (Minn. Ct. App. 1986) (involving a nonmarital debt). As examples of cases involving a claimed debt of dubious existence or of a moral rather than a legal obligation, see *In re* Marriage of Einhorn, 178 Ill. App. 3d 212, 221, 533 N.E.2d 29, 34 (1988); Yackel v. Yackel, 366 N.W.2d 382, 385 (Minn. Ct. App. 1985); Divine v. Divine, 752 S.W.2d 76, 79 (Mo. Ct. App. 1988).

85. *See In re* Marriage of Bauer, 138 Ill. App. 3d 379, 388, 485 N.E.2d 1318, 1323 (1985) (no dissipation where marital funds were used to repay funds loaned by the father of one of the spouses, where loan was made for a marital purpose); *In re* Marriage of Lord, 125 Ill. App. 3d 1, 6, 465 N.E.2d 151, 154 (1984) (trial court could disbelieve spouse's testimony that assets had been used to repay debt to third party, and therefore did not err in holding that spouse had dissipated assets in question); S.L.J. v. R.J., 778 S.W.2d 239, 244-45 (Mo. Ct. App. 1989), *cert. denied sub nom.* R.J. v. Kahn, 110 S. Ct. 1823 (1990) (money assertedly used by husband to repay a debt to his father held to be distributable as marital property). *Cf. In re* Marriage of Los, 136 Ill. App. 3d 26, 30-31, 482 N.E.2d 1022, 1025 (1985) (record supported finding that judgment lien held on marital property by spouse's parents was fraudulent, and therefore no error in ordering the spouse to repay the loan); Schmeusser v. Schmeusser, 559 A.2d 1294, 1299 (Del. 1989) (agreement providing that spouse's parents retained a 50% ownership interest in spouse's business held to be a sham designed to shield marital property from the other spouse).

86. *See In re* Marriage of Aud, 142 Ill. App. 3d 320, 331, 491 N.E.2d 894, 901 (1986) (no dissipation where spouse acquiesced in payments that other spouse had made for the care of his mother); *In re* Marriage of Bauer, 138 Ill. App. 3d 379, 388, 485 N.E.2d 1318, 1323 (1985) (no dissipation when marital funds were used to repay funds loaned by the father of one of the spouses, when loan was made for a marital purpose and when other spouse had agreed that marital funds were to be used to repay loan); *Willis*, 107 A.D.2d at 868, 484 N.Y.S.2d at 310. *See also*, applying a generalized notion of consent, Robinette v. Robinette, 736 S.W.2d 351, 354 (Ky. Ct. App. 1987) (although gifts to family members can constitute dissipation, in this marriage charity was a marital enterprise in view of evidence of financial assistance to family members; no specific evidence that other spouse consented to the gifts in question). *Cf. In re* Marriage of Reeser, 97 Ill. App. 3d 838, 841, 424 N.E.2d 45, 48 (1981) (no testimony that spouse did not enjoy or otherwise participate in the other spouse's racing hobby).

rily bar a finding of dissipation.[87] Issues of consent and acquiescence are discussed in more detail in the Suggested Analysis, *infra*.[88]

5. *Burden of Proof*

The dissipation doctrine presents some interesting issues regarding the burden of proof. In dissipation cases, one recurring factual issue is whether funds which were admittedly expended by a spouse were spent for a permissible purpose. The relevant facts—when the funds were spent and for what purpose—are often exclusively within the possession of the spouse who made the expenditure. If courts follow the general rule that the burden of proof is on the proponent, and if they therefore place the burden of proof on the spouse claiming dissipation, it may be difficult for that spouse to establish the purpose for which the funds were expended.[89] Even if a spouse is held to have made a prima facie case by showing that money was expended, a problem may result if the dissipating spouse makes a general self-serving statement that the expenditures were made for a proper purpose (*e.g.*, living expenses) that the other spouse cannot disprove because of lack of access to the information involved. Although it is true that a court is free to disbelieve testimony of the spouse who made the expenditures,[90] there are cases in which it appears that a court perhaps too readily accepted such testimony.[91] Many Illinois decisions have adopted a special rule for dissipation cases: The person charged with dissipation is under an obligation to establish by clear and specific evidence how the funds were spent; general and vague statements that the funds were expended for marital expenses are not adequate.[92] Other courts have similarly placed the burden of proof on the spouse charged with dissipation.[93]

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87. *See In re* Marriage of O'Neill, 185 Ill. App. 3d 566, 570, 541 N.E.2d 828, 831 (1989), *rev'd on other grounds*, 138 Ill. 2d 487, 563 N.E.2d 494 ("the nondissipating spouse may acquiesce in conduct that dissipates assets for various reasons, including family harmony. The dissipation may still be a factor to consider in dividing the family assets.").

88. *See infra* text accompanying notes 160-62.

89. *See* Gaston v. Gaston, 608 S.W.2d 332, 335 (Tex. Ct. App. 1980).

90. For examples where courts disbelieved the explanation offerred by the dissipating spouse, see *In re* Marriage of Lord, 125 Ill. App. 3d 1, 6, 465 N.E.2d 151, 154 (1984); Dove v. Dove, 773 S.W.2d 871, 874 (Mo. Ct. App. 1989); Bland v. Bland, 652 S.W.2d 690, 692 (Mo. Ct. App. 1983); *In re* Marriage of Hunter, 196 Mont. 235, 240-42, 639 P.2d 489, 491-92 (1982). *Cf.* Semasek v. Semasek, 509 Pa. 282, 290-91, 502 A.2d 109, 113 (1985) (spouse's testimony regarding the disposition of funds for, *inter alia*, living expenses was not precise and the factfinder was not required to consider it).

91. *See* Howerton v. Howerton, 796 S.W.2d 665, 668 (Mo. Ct. App. 1990); Gaston v. Gaston, 608 S.W.2d 332, 335 (Tex. Ct. App. 1980); Dean v. Dean, 87 Wis. 2d 854, 869-70, 275 N.W.2d 902, 908 (1979). *Cf. In re* Marriage of Lippert, 192 Mont. 222, 227-28, 627 P.2d 1206, 1208-09 (1981) (trial court disbelieved spouse's testimony that he had lost $96,000 in marital funds in a bad business venture; appellate court reversed, apparently disregarding the trial court's holding on this factual issue).

92. The seminal decision is *In re* Marriage of Smith, 128 Ill. App. 3d 1017, 1022, 471 N.E.2d 1008, 1013 (1984). *Smith* has been cited many times. *See, e.g.*, *In re* Marriage of Westcott, 163 Ill. App. 3d 168, 175, 516 N.E.2d 566, 570 (1987); *In re* Marriage of Partyka, 158 Ill. App. 3d 545, 550, 511 N.E.2d 676, 680 (1987); *In re* Marriage of Petrovich, 154 Ill. App. 3d 881, 886, 507 N.E.2d 207, 210 (1987); *In re* Marriage of Los, 136 Ill. App. 3d 26, 32-33, 482 N.E.2d 1022, 1026 (1985).

93. *See* Manaker v. Manaker, 11 Conn. App. 653, 659, 528 A.2d 1170, 1173 (1987); Clements v. Clements, 10 Va. App. 580, 586, 397 S.E. 257, 261 (1990). *Cf. In re* Marriage of Merry, 213 Mont. 141, 150-51, 689 P.2d 1250, 1254-55 (1984).

B. *The "Marital Property" Analysis*

Some decisions do not use a dissipation analysis[94] in situations where a spouse has expended or transferred property that would have been subject to equitable distribution. Instead the issue as presented in such cases is simply whether the transferred or disposed of property is to be regarded as subject to equitable distribution.[95] Many of the specific legal questions that have been considered in connection with the dissipation doctrine also arise under this approach, which I will call the "marital property" approach. For example, decisions using a marital property approach have had to determine whether living expenses or similar expenses of a spouse or the children of the parties are a permissible expenditure,[96] whether an expenditure that takes place prior to marital breakdown can be the subject of judicial action,[97] whether a spouse or a third party owned funds in dispute,[98] and whether a spouse in an equitable distribution proceeding should be debited to the extent of a loan[99] or a gift[100] by that spouse to a third party.

Analysis of questions such as these would seem to present the same issues whether or not the term "dissipation" is used as part of the analytical structure. It might, therefore, seem immaterial as to whether a particular jurisdiction follows a "dissipation" or a "marital property" approach. However, decisions that

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94. The term "dissipation analysis" is used herein to refer to decisions that deal with a claim of diminution of property subject to equitable distribution and which use the term "dissipation" or similar terminology.

95. *See, e.g.*, Bolling v. Bolling, 768 S.W.2d 643, 645 (Mo. Ct. App. 1989); Dove v. Dove, 773 S.W.2d 871, 874 (Mo. Ct. App. 1989); Bland v. Bland, 652 S.W.2d 690, 692 (Mo. Ct. App. 1983); Barnhart v. Barnhart, 343 Pa. Super. 234, 239-40, 494 A.2d 443, 445-46 (1985); Paryzek v. Paryzek, 776 P.2d 78, 84 (Utah Ct. App. 1989). *See also, infra*, decisions cited in notes 96-100.

96. As examples of cases holding that a spouse's use of funds for the spouse's living expenses was proper, see Doyle v. Doyle, 786 S.W.2d 620, 622 (Mo. Ct. App. 1990); Fornachon v. Fornachon, 748 S.W.2d 705 (Mo. Ct. App. 1988); *In re* Marriage of Layton, 687 S.W.2d 214, 216 (Mo. Ct. App. 1985). For prior discussion of this issue in connection with the dissipation doctrine, see *supra* text accompanying notes 66-67.

97. *See* Cooksey v. Cooksey, 280 S.C. 347, 351-52, 312 S.E.2d 581, 584-85 (Ct. App. 1984) (trial court erred in refusing to consider, on the ground that the parties were living together and had not separated at the time of the transfers, one spouse's contention that the other spouse had secreted jointly owned marital funds in anticipation of divorce). For prior discussion of this issue in connection with the dissipation doctrine, see *supra* text accompanying notes 39-54.

98. *See* Estep v. Estep, 326 Pa. Super. 404, 417, 474 A.2d 302, 309 (1984) (rejecting spouse's claim that funds he withdrew from parties' safe deposit box belonged to a third party). *See also*, not using the dissipation doctrine in connection with this issue, *In re* Marriage of Los, 136 Ill. App. 3d 26, 31-32, 482 N.E.2d 1022, 1025-26 (1985) (at the time of separation, wife sent her parents $10,000 from a bank account in the joint names of herself and her mother; husband contended that the funds in the account had been deposited by wife from her earnings, and that, therefore, dissipation had occurred of funds subject to equitable distribution; court found that the source of the funds in the account was wife's mother's earnings and other funds derived from wife's parents).

99. *See* Nedblake v. Nedblake, 682 S.W.2d 852, 856 (Mo. Ct. App. 1984) (loan by spouse to his son during marriage funded in part from jointly owned property held distributable as marital property). *See also* Dean v. Dean, 87 Wis. 2d 854, 867-69, 275 N.W.2d 902, 908 (1979) (repayment by spouse of obligation to his mother upheld, as against other spouse's contention that the transaction was fraudulent). For prior discussion of the issue of loans, loan repayments, and debts in connection with the dissipation doctrine, see *supra* text accompanying notes 82-85.

100. *See* Brooks v. Brooks, 733 P.2d 1044, 1055 (Alaska 1987) (if both spouses do not join in making a gift of property to a third party during the marriage, that gift is voidable at the option of the nonparticipating spouse), discussed *infra* at text accompanying notes 132-33; Van Wyk v. Van Wyk, 86 Wis. 2d 100, 114-15, 271 N.W.2d 860, 866 (1978) (wedding gift of $5,000 by spouse to his eldest daughter during divorce was not marital property because the spouses had previously given a $5,000 wedding gift to son). For prior discussion of this issue in connection with the dissipation doctrine, see *supra* text accompanying notes 79-81.

use a marital property approach often simply utilize an ad hoc approach to the particular question before the court, without any attempt to develop a general analytical framework to be utilized in cases involving diminution of assets subject to equitable distribution.[101] Such an ad hoc approach affords little basis for guiding subsequent judicial development of the law, and can lead to confusion.[102] The point being made, however, is not that use of the marital property approach will necessarily produce confusion and poorly reasoned decisions, nor that use of the dissipation doctrine will necessarily produce a satisfactory result. Indeed, the dissipation doctrine has not always produced predictability, and none of the approaches that use the term "dissipation" is completely satisfactory insofar as the overall breadth of the doctrine is concerned. However, a jurisdiction that consistently uses the dissipation terminology has a better chance of developing a consistent approach to the myriad of issues that can arise in connection with a claim of diminution of marital funds. Courts in such a jurisdiction are more likely to cumulatively and constructively build on prior precedent. Moreover, there is a better chance for crossfertilization among jurisdictions if the jurisdictions are using the same terminology.[103]

Additionally, the ad hoc marital property approach may not permit the flexibility that the dissipation approach permits. For example, under the dissipation approach the court has the power to consider the existence of dissipation as a factor in dividing what remains, and the court does not necessarily have to treat the dissipated property as being in existence. However, under the "marital property" approach, if the property in question is marital property, then presumably a court would not have the power to consider the dissipating conduct as a factor, and the only remedy would be that in all instances the property would be deemed part of the "pot" available for equitable distribution.[104]

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101. *See, e.g.*, Ahlo v. Ahlo, 1 Haw. App. 324, 329, 619 P.2d 112, 117 (1980); Paryzek v. Paryzek, 776 P.2d 78, 84 (Utah Ct. App. 1989).

102. *E.g.*, *compare* Brooks v. Brooks, 733 P.2d 1044, 1055 (Alaska 1987) (if both spouses do not join in making a gift of property to a third party during the marriage, that gift is voidable at the option of the nonparticipating spouse; dissipation analysis not used) *with* Streb v. Streb, 774 P.2d 798, 802 (Alaska 1989) (until the marriage ceases to operate as a financial unit, each party has the right to manage and control marital funds); *compare* Gruver v. Gruver, 372 Pa. Super. 194, 200, 539 A.2d 395, *appeal denied*, 520 Pa. 605, 553 A.2d 968 (1988) (refusal to sign joint return held to have resulted in dissipation of marital property; no discussion of authority) *with* Hunsinger v. Hunsinger, 381 Pa. Super. 453, 464-65, 554 A.2d 89, 95 (1989) (spouse not entitled to credit for higher tax payment caused by other spouse's refusal to file joint tax return; term "dissipation" not used).

103. For example, the Illinois cases have been cited and have contributed to the development of the dissipation doctrine in Maryland and Virginia. *See* Sharp v. Sharp, 58 Md. App. 386, 401-02, 473 A.2d 499, 506-07, *cert. denied*, 300 Md. 795, 481 A.2d 240 (1984); Booth v. Booth, 7 Va. App. 22, 27, 371 S.E.2d 569, 572 (1988). *See also* Clements v. Clements, 10 Va. App. 580, 586-87, 397 S.E.2d 257, 261 (1990) (discussing decisions in various jurisdictions).

104. *See, e.g.*, *Ahlo*, 1 Haw. App. at 329, 619 P.2d at 117 (not using the "dissipation" terminology and holding that the property in question should be treated as marital property and debited to the spouse making the expenditures in question); Missouri decisions cited *supra* note 12.

III. THE COMMUNITY PROPERTY MODEL

While in a common law state a spouse has no ownership interest in property acquired by and kept in the name of the other spouse,[105] in a community property state each spouse has a present equal ownership interest in community property as it is acquired by either spouse during the marriage.[106] In order to protect each spouse's present ownership interest in community property, and in view of the general rule that gives each spouse an equal right to manage and control at least the community personal property,[107] community property states have adopted various statutory provisions that restrict the right of a spouse to freely deal with community property.[108] Thus, statutory provisions commonly restrict the ability of a spouse to make a gratuitous transfer of community property,[109] to make any unilateral disposition of certain kinds of community personal property,[110] or to dispose of community assets that constitute a busi-

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105. The fact that in common law states property acquired by a spouse may be subject to equitable distribution upon divorce is not the equivalent of an ownership interest during the marriage.

106. *See, e.g.*, CAL. CIV. CODE § 5105 (West 1983); LA. CIV. CODE ANN. art. 2336 (West 1985); NEV. REV. STAT. ANN. § 123.225(1) (Michie 1986). *See also* Peters v. Skalman, 27 Wash. App. 247, 257, 617 P.2d 448, 452 (1980).

In general, community property consists of property acquired by either spouse during the marriage, with certain exceptions (*e.g.*, property acquired by a spouse prior to marriage or by gift or inheritance). Property that is not community property is generally designated as "separate" property. For a general discussion of community property systems, see W. MCCLANAHAN, COMMUNITY PROPERTY LAW IN THE UNITED STATES (Law. Co-op. 1982); R. MENNELL & T. BOYKOFF, COMMUNITY PROPERTY IN A NUTSHELL (2d ed. 1988); Pagano, *The Characterization and Division of Community Property*, in 1 VALUATION AND DISTRIBUTION OF MARITAL PROPERTY §§ 20.01-20.07 (J. McCahey ed. 1990).

107. *See* ARIZ. REV. STAT. ANN. § 25-214(B) (1976); CAL. CIV. CODE § 5125(a) (West Supp. 1990); IDAHO CODE § 32-912 (1983); LA. CIV. CODE ANN. art. 2346 (West 1985); NEV. REV. STAT. ANN. § 123.230 (Michie 1986); N.M. STAT. ANN. § 40-3-14(A) (1989); TEX. FAM. CODE ANN. § 5.22(c) (Vernon 1975); WASH. REV. CODE ANN. § 26.16.030 (1986).

In some community property states, statutory provisions preserve sole managerial rights for a spouse with respect to certain property. *See, e.g.*, N.M. STAT. ANN. § 40-3-14(B)(1) (1989) (where only one spouse is named in a document evidencing ownership of community personal property, only that spouse may manage or control the property); TEX. FAM. CODE ANN. § 5.22(a) (Vernon 1975) (spouse has the exclusive right to control or manage the community property that he or she would have owned if single).

108. Such statutory protection may be necessary in various situations. For example, the spouse who acquired property that is community property may attempt to deal with that property in a way that is harmful to the ownership interest of the other spouse in that property. Moreover, a spouse who acquires property that is community property should be protected against acts of mismanagement by the other spouse (to the extent that the other spouse has rights of management) with respect to that property.

109. *See, e.g.*, CAL. CIV. CODE § 5125(b) (West Supp. 1990) (no gift of community personal property without the written consent of the other spouse); LA. CIV. CODE ANN. art. 2349 (West 1985) (donation of community property to a third person requires the concurrence of the spouses, but a spouse acting alone may make a usual or customary gift of a value commensurate with the economic position of the spouses at the time of the donation); NEV. REV. STAT. ANN. § 123.230(2) (Michie 1986) (neither spouse may make a gift of community property without the express or implied consent of the other spouse); WASH. REV. CODE ANN. § 26.16.030(2) (1986) (neither spouse may make a gift of community property without the express or implied consent of the other spouse).

110. *See, e.g.*, CAL. CIV. CODE § 5125(c) (West Supp. 1990) ("A spouse may not sell, convey, or encumber community personal property used as the family dwelling, or the furniture, furnishings or fittings of the home, or the clothing or wearing apparel of the other spouse or minor children which is community property, without the written consent of the other spouse."); LA. CIV. CODE ANN. art. 2347 (West 1985) (concurrence of both spouses is required for the alienation of community furniture or furnishings while located in the family home); NEV. REV. STAT. ANN. § 123.230(5) (Michie 1986) (neither spouse may sell community household goods, furnishings or appliances unless the other spouse joins in executing the contract of sale, if any); WASH. REV. CODE ANN. §

ness.[111] Failure to comply with these statutory restrictions may be immediately enforceable.[112] In addition to these statutory provisions, some statutory provisions impose a general duty of care with respect to the management of community property.[113]

The protection afforded by such statutes is more extensive than the protection afforded by the dissipation doctrine. For example, statutes that restrict the right of a spouse to make any transfer of certain types of community property seem designed to protect the other spouse from being deprived of essentials. The restriction operates whatever the purpose of the expenditure—even an expenditure for marital purposes is prohibited by these statutes. Moreover, the protection afforded by such statutes, unlike the protection afforded by the dissipation doctrine, is available outside a divorce proceeding.

It is, of course, not surprising that community property states extend significant protection to each spouse's ownership interest in community property, and that such protection is more extensive than the protection afforded by the dissipation doctrine. However, notwithstanding the existence of this protective system, the dissipation doctrine or a cognate may exist and serve a significant purpose in community property states. Thus, where a community property state permits equitable distribution of property,[114] it is helpful for a court to be able

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26.16.030(5) (1986) (neither spouse may sell community household goods, furnishings or appliances unless the other spouse joins in executing the contract of sale, if any).

111. *See, e.g.*, CAL. CIV. CODE § 5125(d) (West Supp. 1990) (a spouse who is operating a business that is community personal property has the primary management and control, but must give prior written notice to the other spouse of any disposition of all or substantially all of the personal property used in the operation of the business); LA. CIV. CODE ANN. arts. 2347 (concurrence of both spouses is required for the alienation of all or substantially all of the assets of a community enterprise), 2352 (a spouse who is a partner has the exclusive right to manage the partnership interest) (West 1985); NEV. REV. STAT. ANN. § 123.230(6) (neither spouse may sell assets of a business without the consent of the other where both spouses participate in its management) (Michie 1986); WASH. REV. CODE ANN. § 26.16.030(6) (1986) (neither spouse may sell assets of a business without the consent of the other where both spouses participate in its management).

112. *See* CAL. CIV. CODE § 5125.1 (West Supp. 1990); LA. CIV. CODE ANN. art. 2353 (West 1985) (alienation of community property without the consent of the other spouse, where such consent is required by law, is a "relative nullity").

113. CAL. CIV. CODE § 5125(e) (West Supp. 1990) provides as follows:

> Each spouse shall act in good faith with respect to the other spouse in the management and control of the community property in accordance with the general rules which control the actions of persons having relationships of personal confidence . . . until such time as the property has been divided by the parties or by a court. This duty includes the obligation to make full disclosure to the other spouse of the existence of [community] assets . . . and [community] debts . . . upon request. . . . In no event shall this standard be interpreted to be less than that of good faith in confidential relations . . . .

See also LA. CIV. CODE ANN. art. 2354 (West 1985) (a spouse is liable for any loss caused by fraud or bad faith in the management of community property).

Case law similarly may impose a fiduciary duty. *See* Spruill v. Spruill, 624 S.W.2d 694, 697 (Tex. Ct. App. 1981) (a trust relationship exists between the spouses as to community property controlled by each spouse, and a presumption of constructive fraud arises when a spouse unfairly disposes of the other spouse's one-half interest in community property; the burden of proof is on the disposing spouse to prove the fairness of the disposition of the other spouse's one-half ownership interest); *In re* Marriage of Matson, 107 Wash. 2d 479, 484, 730 P.2d 668, 671 (1986) (the demise of the rule that husband was the sole manager of community property in favor of the equal manager concept has not resulted in the demise of the fiduciary duty; instead, the duty is gender neutral); Peters v. Skalman, 27 Wash. App. 247, 251, 617 P.2d 448, 452 (1980) (spouses owe each other the highest fiduciary duties).

114. Of the eight community property states, only Washington permits equitable distribution of both community and noncommunity property. WASH. REV. CODE ANN. § 26.09.080 (Supp. 1990). Arizona and Nevada permit equitable distribution of both community property and a limited class of separate property. *See* ARIZ. REV. STAT.

to consider, in making equitable distribution, dissipation or diminution of distributable property. At least some community property states clearly permit a court to do so.[115] If a court does not have the power to consider dissipation or diminution of assets, a spouse might be forced to litigate issues of diminution by bringing an independent action under the protective statutes referred to above. Because separate suits involve additional cost and delay, the alternative is not a desirable one. Indeed, California, which does not permit equitable distribution of community or separate property,[116] permits a court to make a monetary award from a party's share of community property if there has been deliberate misappropriation.[117]

The judicial decisions in community property states that deal with the dissipation or dimunition of assets subject to equitable distribution generally involve questions of whether a particular expenditure constitutes dissipation or diminution. Such decisions generally seem to mirror decisions in common law states. For example, it has been held that a court making equitable distribution may consider the expenditure of community funds on gambling or extramarital sexual affairs[118] or excessive drinking.[119] Courts also have held that a spouse is not chargeable for funds lost in business operations if the operations were conducted in good faith,[120] and that gifts by a spouse of community property may,

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ANN. § 25-318(A) (Supp. 1989) (permitting equitable distribution of both community property and joint tenancy and other property held in common); NEV. REV. STAT. ANN. § 125.150(1)(b)(2) (Michie Supp. 1989) (permitting equitable distribution of community property and property placed in joint tenancy after July 12, 1979). Idaho and Texas permit equitable distribution of community property but not separate property. *See* IDAHO CODE § 32-712 (1983); TEX. FAM. CODE ANN. § 3.63 (Vernon Supp. 1990), as interpreted in Eggemeyer v. Eggemeyer, 554 S.W.2d 137, 139-42 (Tex. 1977) and Cameron v. Cameron, 641 S.W.2d 210, 213-20 (Tex. 1982). California does not permit equitable division but only permits equal division of community property and division of some types of separate property. *See* CAL. CIV. CODE § 4800(a) (West Supp. 1990) (community estate of the parties is to be divided equally); CAL. CIV. CODE § 4800.4(a) (West Supp. 1990) (court may, in a proceeding for division of community property, divide the separate property interests of the parties in real or personal property held by them as joint tenants or tenants in common). The New Mexico and Louisiana statutes both seem to indicate that community property is to be equally divided. *See* W. MCCLANAHAN, *supra* note 106, at 531 (Law. Co-op. 1982); R. MENNELL & T. BOYKOFF, *supra* note 106, at 324-26 (2d ed. 1988); W. REPPY & C. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 292 (2d ed. 1982).

115. Thus, the Texas cases clearly support the right of a court to consider one spouse's diminution of community property in making equitable distribution of community property. *See, e.g.*, Rafidi v. Rafidi, 718 S.W.2d 43, 45-46 (Tex. Ct. App. 1986); Belz v. Belz, 667 S.W.2d 240, 247 (Tex. Ct. App. 1984); Arrington v. Arrington, 613 S.W.2d 565, 569 (Tex. Ct. App. 1981). For similar law in other states, see ARIZ. REV. STAT. ANN. § 25-318(A) (Supp. 1989) and Martin v. Martin, 156 Ariz. 452, 456, 752 P.2d 1038, 1042 (1988); *In re* Marriage of Clark, 13 Wash. App. 805, 808-09, 538 P.2d 145, 147 (1975).

116. *See supra* note 114.

117. *See* CAL. CIV. CODE § 4800(b)(2) (West Supp. 1990) ("court may award from a party's share any sum it determines to have been deliberately misappropriated by such party to the exclusion of the interest of the other party in the community estate").

118. *See, e.g.*, Morrison v. Morrison, 713 S.W.2d 377, 379 (Tex. Ct. App. 1986); Spruill v. Spruill, 624 S.W.2d 694, 697-98 (Tex. Ct. App. 1981); Reaney v. Reaney, 505 S.W.2d 338, 340 (Tex. Ct. App. 1974).

119. *See In re* Marriage of Clark, 13 Wash. App. at 808-09, 538 P.2d at 146-47.

120. *See* Andrews v. Andrews, 677 S.W.2d 171, 175 (Tex. Ct. App. 1984) (a spouse's good faith but unwise investments of community funds resulting in losses to the community estate do not justify an unequal distribution of the remaining community property); Peters v. Skalman, 27 Wash. App. 247, 251, 617 P.2d 448, 452 (1980) (losses as well as gains which result from the managing spouse's activities flow to the community, absent a showing of bad faith). *Cf. In re* Marriage of Schultz, 105 Cal. App. 3d 846, 855, 164 Cal. Rptr. 653, 660 (1980) (negligent mishandling of community finances and negligence in incurring of debt not encompassed by statute which permits unequal awards for "deliberate misappropriation").

even in the absence of a statutory prohibition against such gifts, constitute impermissible dissipation or diminution of community property.[121] Judicial decisions in community property states do not discuss whether conduct resulting in the diminution of assets may be the subject of judicial action where such conduct occurred prior to marital breakdown. Presumably, the dissipation doctrine or its cognate—to the extent that such a doctrine exists in a community property state—encompasses any dissipation of community property, whether the conduct occurred before or after marital breakdown, because any such dissipation interferes with a present ownership interest of the other spouse.[122]

Courts in common law states must carefully consider the extent to which judicial decisions and statutes in community property jurisdictions are sufficiently analogous to be relied upon. The outstanding difference between community property and common law states is that in community property states a spouse has a present ownership interest in community property, whereas in common law states each spouse is free during the marriage to acquire and to own property to the exclusion of any ownership interest of the other spouse. This fundamental difference in the system of property ownership may well result in differential treatment of some dissipation claims. For example, the difference as to ownership may affect the law regarding the basic applicability of a dissipation or diminution doctrine. That is, as has been previously mentioned, no community property state appears to have developed a marital breakdown requirement, probably because of the fact that a dissipation of community property even prior to marital breakdown is still an interference with a present ownership interest of the other spouse. This difference in ownership systems may also result in differing results regarding whether a particular expenditure or particular conduct constitutes dissipation or diminution. For example, the difference would seem insignificant in analyzing whether gambling losses constitute dissipation or diminution. On the other hand, a common law state, in determining the extent to which the dissipation doctrine encompasses a gift made by a spouse from funds acquired by and held solely in the name of that spouse, must keep in mind and carefully evaluate the effect of the fundamental difference in ownership before relying on statutes or case law doctrine in community property states that prohibit a gift by one spouse of community property.[123]

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121. *See* Simpson v. Simpson, 679 S.W.2d 39, 42 (Tex. Ct. App. 1984); *Spruill*, 624 S.W.2d at 697; *Reaney*, 505 S.W.2d at 340.

122. The question of the scope of the dissipation doctrine could arise where a community property state permits equitable distribution of noncommunity property. In such a case, the spouse claiming dissipation would have no ownership interest in the noncommunity property. Therefore, a question could arise as to whether the dissipation doctrine applies to dissipation of noncommunity property which occurred prior to the date of marital breakdown.

123. *See infra* discussion of Brooks v. Brooks, 733 P.2d 1044 (Alaska 1987), at text accompanying notes 133-35.

IV. THE UNIFORM MARITAL PROPERTY ACT MODEL

The Uniform Marital Property Act[124] ("UMPA") provides for a system of property ownership akin to community property. Each spouse acquires a present equal ownership interest in property (with certain exceptions) acquired during the marriage by either spouse,[125] and each spouse has the right to manage various classes of marital property.[126] The UMPA imposes restrictions on gifts of marital property to a third party by one spouse,[127] but does not contain any of the other restrictions on disposition that exist in some community property states.[128] The UMPA does require that each spouse act in good faith in matters involving marital property and other property of the other spouse.[129]

The UMPA provides for various interspousal remedies,[130] but does not speak to divorce.[131] Therefore, the question as to whether dissipation can be

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124. 9A U.L.A. 97-145 (1987). To date, the Act has been adopted by only one state, Wisconsin, and then with substantial modification. *See* WIS. STAT. ANN. §§ 766.001 to 766.97 (West Supp. 1989).

125. UNIF. MARITAL PROPERTY ACT § 4(c), 9A U.L.A. 109 (1987). The property in which an ownership interest is acquired is called "marital property." Certain kinds of property acquired by a spouse during marriage are excluded from the "marital property" classification. *See* § 4(g), 9A U.L.A. 109.

126. Section 5(a) of the Act (9A U.L.A. 114 (1987)) gives a spouse, acting alone, the right to manage and control certain classes of marital property, such as, for example, marital property held in that spouse's name alone or not held in the name of either spouse (§ 5(a)(2)) and marital property held in the names of both spouses in the alternative (§ 5(a)(6)). Section 5(b) provides that spouses may manage and control marital property held in the names of both spouses other than in the alternative only if they act together.

127. Section 6(a) of the Act (9A U.L.A. 116 (1987)) provides:

> A spouse acting alone may give to a third person marital property that the spouse has the right to manage and control only if the value . . . does not aggregate more than [$500] in a calendar year, or a larger amount if, when made, the gift is reasonable in amount considering the economic position of the spouses. Any other gift of marital property to a third person is subject to subsection (b) [which provides for a right to recover the property or a compensatory judgment in the event of a violation of subsection (a)] unless both spouses act together in making the gift.

In Wisconsin, which has adopted a modified version of the UMPA, the limit on the amount of gifts that a spouse can give in a calendar year is $1,000. WIS. STAT. ANN. § 766.53 (West Supp. 1989). Otherwise, and with the exception of some additional matter, Wisconsin's statute retains the above provisions of § 6(a) of the Act.

128. *See supra* notes 110-11 and accompanying text.

129. Section 2(a) of the Act (9A U.L.A. 107 (1987)) provides:

> Each spouse shall act in good faith with respect to the other spouse in matters involving marital property or other property of the other spouse. This obligation may not be varied by a marital property agreement.

The Comment to § 2(a) states:

> Spouses are not trustees or guarantors toward each other. Neither are they simple parties to a contract. . . . A spouse is not bound always to succeed in matters involving marital property ventures, but while endeavoring to succeed in a venture, must proceed with an appropriate regard for the property interests of the other spouse and without taking unfair advantage of the other spouse.

9A U.L.A. 107 (1987).

130. *See* § 15, 9A U.L.A. 132-33 (1987). The Comment to § 15 states, *inter alia*:

> Since the Act creates respective vested interests in marital property while still permitting individual management and control of that property, there is an obvious possibility that management and control rights could be exercised in a way that damages or eliminates the interest of the spouse who does not hold the property. This section creates a remedy for this type of conduct. An important purpose of the section is creation of a remedy for a violation of the good faith responsibility between spouses required by Section 2. . . . It also affords a remedy for violations of specific provisions contained throughout the Act.

9A U.L.A. 133 (1987).

131. Thus, the Prefatory Note to the Act states: "The Act takes the parties 'to the door of the divorce court' only. It leaves to existing dissolution procedures in the several states the selection of the appropriate procedures for dividing property." 9A U.L.A. 100 (1987).

considered in an equitable distribution hearing is not addressed by the Act.[132]

As in the case of community property precedent, a common law state must carefully determine whether the UMPA's provisions restricting the ability of a spouse to deal with marital property are sufficiently analogous to be useful in analyzing questions connected with the dissipation doctrine. For example, in *Brooks v. Brooks*,[133] the court adopted the approach of the UMPA with respect to a gift by a spouse of funds that were apparently otherwise subject to equitable distribution. The court noted:

> The UMPA approach [*i.e.*, § 6(a) of the Act] to analyzing gifts made by one spouse during the marriage is persuasive. It supplies a logical, sound rule of easy application. It also accords ample protection against any surreptitious actions.[134]

The court did not consider the difference in the system of property ownership between Alaska, which is a common law jurisdiction, and the UMPA, under which each spouse acquires a present ownership interest in marital property. The fact that under the UMPA a spouse has an ownership interest in property given away by the other spouse certainly justifies the Act's restrictions. However, the reasoning that supports the UMPA's restrictions may be inapplicable to a common law state's rule regarding gifts.[135]

V. SUGGESTED ANALYSIS

Conduct of a spouse that constitutes dissipation or diminution of assets subject to equitable distribution not only reduces the amount of assets available for equitable distribution but is also relevant in evaluating the contributions made by the spouses with respect to the marriage and its economic success. Therefore, even if a state statute does not specifically mandate that dissipation be considered as a factor in making equitable distribution,[136] such statutes may easily—and, because of the fundamental soundness of the dissipation doctrine,[137] should be—interpreted to provide that dissipation may be considered as such a factor. Moreover, although statutory language does not usually specifically authorize the offset approach when a court is faced with dissipating conduct,[138] the offset approach is, in essence, simply a variant of the general rule permitting dissipation to be considered as a factor in making equitable distribution; as such, a court should have the power to utilize the offset approach where appropriate. Whether a court can make a compensatory award where sufficient assets do not exist will depend upon the interpretation of particular statutory

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132. In view of the silence of the Act concerning property division upon divorce, any state which adopts the UMPA must independently determine the method of property distribution to be utilized upon divorce. In Wisconsin, WIS STAT. ANN. § 767.255 (West 1981), which predates the UMPA and which authorizes equitable property division upon divorce, governs. *See* Mausing v. Mausing, 146 Wis. 2d 92, 99, 429 N.W.2d 768, 771 (1988); Kuhlman v. Kuhlman, 146 Wis. 2d 588, 590-93, 432 N.W.2d 295, 297 (Ct. App. 1988).

133. 733 P.2d 1044 (Alaska 1987).

134. *Id.* at 1055.

135. *See* discussion *infra* in Part V. SUGGESTED ANALYSIS.

136. *See supra* notes 14-15.

137. *See supra* text accompanying notes 20-22.

138. *See supra* text accompanying note 12 (discussing the offset approach).

language.[139] However, if the language of the governing statute is not viewed as controlling on this question, equitable considerations seem to weigh heavily in favor of permitting such an award.[140]

The question of the scope of the dissipation doctrine presents more difficult issues. The disagreement that exists among the various jurisdictions is simply about the extent of the protection to be afforded to a spouse's interest in property that is subject to equitable distribution. There is no disagreement about the fundamental principle that such an interest should be subject to at least some degree of protection.[141] I believe that the dissipation doctrine should extend maximum protection to this interest and should therefore be applicable to any expenditure or other conduct that diminishes or adversely affects funds available for equitable distribution, no matter when such expenditure or conduct occurred. I therefore reject, as applicable standards, both the law making the dissipation doctrine applicable only where the conduct in question has occurred after marital breakdown[142] and the case law holding (or suggesting) that the dissipation doctrine is applicable only where the conduct in question has been engaged in with intent to deprive the other party of rights in equitable property distribution.[143] The question that jurisdictions must face is whether either of the two standards that restrict the scope of the dissipation doctrine is preferable to an unrestricted standard.

Of the two restrictive standards, the marital breakdown requirement appears to be the one that has been relied upon the most. However, few decisions discuss the rationale for that limitation. One suggested rationale is that the limitation is necessary in order to avoid courts being asked to "audit" failed marriages, the suggestion being that once a marriage has failed a party will then utilize the dissipation doctrine to question all expenditures and other conduct of

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139. *See supra* note 13.

140. A court needs the power to enter such an award so as to be able to deal adequately with the problem of the spouse who secrets property subject to equitable distribution. For example, if a spouse is successful in secreting property, the other spouse may not be able to prove the existence of such property. If the dissipating spouse has successfully secreted the great majority of the property subject to equitable distribution so that the other spouse is unable to prove that any of the property is in existence at the time of equitable distribution, a court which lacks the power to enter a compensatory award may be helpless to protect the innocent spouse. Thus, requiring a spouse to prove the existence of the dissipated funds as a prerequisite for an award may have the effect of rewarding a dissipating spouse who secrets the property in such a way that it cannot be found. Moreover, even if the funds are in fact no longer in existence, it is unfair to permit a spouse's own dissipation of funds to insulate that spouse from liability to the other spouse where no other marital funds remain.

141. For example, the marital breakdown requirement does extend protection against dissipating conduct which occurs after marital breakdown, regardless of whether the assets involved were acquired before or after the breakdown and regardless of whether one or both spouses "owned" the assets as long as the assets were subject to equitable distribution.

It may be noted that the dissipation doctrine is not unique in extending protection to an interest in property subject to equitable distribution even though the interest is not an ownership interest. Thus, statutes in common law states not uncommonly do confer protection against a spouse's dealing with such property after matrimonial litigation has been commenced. *See, e.g.*, PA. CONS. STAT. ANN. tit. 23, § 403(a) (Purdon Supp. 1990) (court may issue an injunction to prevent removal of property from the jurisdiction or to prevent disposition, alienation, or encumbrance of property in order to defeat equitable distribution).

142. *See supra* notes 45-48 and accompanying text.

143. *See supra* decisions cited at note 55.

the other spouse, no matter when such expenditures or conduct occurred.[144] Presumably, the concern is that a spouse may utilize the dissipation doctrine to harass the other spouse by making frivolous claims. A further concern is that the defendant spouse will have more difficulty rebutting a claim of dissipation that relates to the time period when the parties were living together because the spouse would not be "on guard" and would, therefore, be less prepared to rebut the charge.[145]

However, this rationale is not convincing. First, although the nonrestrictive standard that I espouse will no doubt result in claims of dissipation based on conduct that predated any marital breakdown, such claims of dissipation need not necessarily present more difficult questions for the court, and in any event courts are competent to decide whatever disputed questions of fact are presented. More importantly, it must be remembered that the marital breakdown requirement bars all claims of dissipation that predate breakdown, no matter how egregious the conduct and even if such conduct constitutes conversion by one spouse of property jointly owned by both spouses. This absolute insulation of conduct occurring prior to marital breakdown seems inconsistent both with statutory provisions which, without imposing any time constraints, authorize a court to consider dissipation,[146] and with the protection that prior law afforded to jointly owned funds.[147] In any event this insulation of dissipation occurring prior to marital breakdown is unwise in view of the purposes that equitable distribution is designed to serve. Given the existence of wrongdoing—*i.e.*, dissipation—the reasons that have been advanced for differential treatment of the wrongdoing based on the time of its occurrence seem, in essence, to be based more on judicial convenience than on substance. Thus, the

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144. *See In re* Marriage of Getautas, 189 Ill. App. 3d 148, 154-55, 544 N.E.2d 1284, 1288 (1989). *Cf.* Panhorst v. Panhorst, 390 S.E.2d 376, 379 (S.C. Ct. App. 1990).

145. *Getautas*, 189 Ill. App. 3d at 154-55, 544 N.E.2d at 1288. The court in *Getautas* was also influenced by the interaction between the burden of proof rules in Illinois in dissipation cases and the marital breakdown requirement. *See supra* text accompanying notes 89-93.

146. See *supra* notes 14 and 15 for a listing of the various statutory provisions. *But see In re* Marriage of O'Neill, 138 Ill. 487, 563 N.E.2d 494 (1990) (construing the Illinois statute as containing a marital breakdown requirement).

147. Prior to equitable distribution, case law protected a spouse in situations where the other spouse converted joint assets or used joint assets for his sole benefit, even if the spouses were living together at the time of the conversion. *See, e.g.*, Feltz v. Pavlik, 257 S.W.2d 214, 218 (Mo. Ct. App. 1953); Berhalter v. Berhalter, 315 Pa. 225, 227-28, 173 A. 172, 173 (1934). (By way of analogy, note that case law also protected a spouse against actions of the other spouse in transferring property, even while the spouses were still living together, in order to defeat the alimony rights of a spouse or the rights of a spouse to take an elective share in the estate of the transferring spouse. *See, e.g.*, Anderson v. Anderson, 583 S.W.2d 504, 505 (Ky. Ct. App. 1979) (husband cannot make a voluntary transfer of real or personal property with the intent of preventing his wife from sharing in such property at his death); *see generally* W. MACDONALD, *supra* note 57.)

One does not know how much of this older case law continues to survive the adoption of equitable distribution. It is possible that this older case law survives intact. It may therefore be argued that the limitation placed on the dissipation doctrine by the breakdown test is not harmful because the older remedies that existed prior to equitable distribution remedies remain available. However, even if the older remedies remain available, relegating a spouse to these remedies is inadequate because the wrong—the dissipation—should be capable of being dealt with in an equitable distribution proceeding. It would be unfair to the wronged spouse to require a vindication to be sought in a proceeding separate and apart from a divorce proceeding. Such a requirement can only lead to complications, delay, and further unnecessary expense. (Remember also that state law often permits an award to a needy spouse of attorney's fees in connection with divorce litigation; it is unlikely that state law would give a court the power to make such an award in a separate lawsuit to vindicate a spouse's property rights.)

rationale offered for the marital breakdown requirement is unconvincing.[148] Moreover, as previously discussed, determining the time of marital breakdown may be difficult and may impose an unfair burden of proof on the nondissipating spouse.[149] It also should be carefully noted that the nonrestrictive standard which I espouse does not in effect amount to judicial adoption of community property principles. Fundamental differences would still exist between my standard and community property, in that even under an unrestricted standard a spouse has no ownership rights, and hence no right of management or control, of property owned by the other spouse. Moreover, the nonrestrictive standard confers no enforceable rights during the marriage: Rights exist only in connection with equitable distribution.

In addition to the marital breakdown requirement, the other standard that restricts the scope of the dissipation doctrine is the anticipation of divorce standard. Under this test, the dissipation doctrine applies when property has been intentionally dissipated with a view to divorce to defeat the other spouse's equitable distribution rights. For reasons that have been discussed previously,[150] this standard is not a satisfactory one.

In addition to the disagreement among the courts regarding the scope of the dissipation doctrine, disagreement also exists regarding the type of expenditures that constitute dissipation. One step that might prove helpful would be to adopt a general standard, one that would control in the absence of more specific rules, regarding whether expenditures constitute dissipation. Although common law states generally have not adopted such a standard, such a standard could be useful in resolving some of the questions that have arisen. For example, a general good faith duty, similar to that which exists under the California statute[151] and the UMPA[152] might be helpful in resolving questions that have arisen regarding whether losses in business transactions constitute dissipation.[153]

However, although a general standard might be useful in resolving some questions, other questions require more specific rules. For example, a bona fide gift by a spouse to a third party (*e.g.*, a relative) of funds owned by that spouse but still subject to equitable distribution is arguably consistent with a good faith requirement, even if given without the consent of the other spouse, in the absence of any other specific rule. However, decisions in common law states have tended to treat such gifts as dissipation or diminution,[154] regardless of whether the gift was derived from jointly owned or individually owned funds and regardless of the identity of the recipient of the gift (*e.g.*, regardless of whether the recipient of the gift was a paramour or the spouse's child). Unfortunately, how-

148. It may be suggested that the marital breakdown requirement is a way of protecting the traditional right of a spouse to do as she pleases with her property. *See* Booth v. Booth, 7 Va. App. 22, 371 S.E.2d 569 (1988). However, even that requirement recognizes the propriety of interference with a spouse's exercise of his ownership rights over even individually owned property where such conduct occurs after marital breakdown and where under state law the property involved would be subject to equitable distribution.

149. *See supra* text accompanying notes 53-54.

150. *See supra* text accompanying notes 55-57.

151. *See supra* note 113.

152. *See supra* note 129.

153. *See supra* note 64 and accompanying text.

154. *See supra* notes 79-80 and accompanying text.

ever, the decisions generally have not included any extensive analysis of the issue. Where jointly owned funds are concerned, the law in community property states and under the UMPA is analogous. This line of analogous authority furnishes two different approaches, either requiring the consent of the other spouse[155] or permitting a spouse, acting alone, to make a gift that falls within certain dollar limitations or is reasonable under the economic circumstances of the parties.[156] Of these two approaches, requiring the consent of the other spouse is the most protective and seems appropriate in view of the other spouse's ownership interest in the property. Where individually owned funds are concerned, however, the community property experience is less relevant. In that situation, there is more of a need in a common law state to accommodate the ownership interest of the donor spouse and, therefore, an approach that permits a gift that is reasonable under the circumstances seems appropriate. Even here, however, one may question whether a gift by a spouse to a paramour can ever constitute a reasonable gift.[157]

Another problem that is not easily resolved by the application of a general fiduciary duty standard and which has provoked some disagreement among the courts involves the extent to which expenditures loosely categorized as "living expenses," including reasonable living expenses, constitute dissipation.[158] Such expenditures, if made from individually owned funds, should not constitute dissipation even though the individually owned funds are subject to equitable distribution, because the expending spouse must be able to appropriately support himself. Such expenditures for support do not unduly infringe on the economic rights of the other spouse. Permissible expenditures could include those for rent, furniture and furnishings, reasonable vacations, and other similar usual living expenses. In all cases the basic governing rule should be that the expenses be reasonable under the circumstances and in view of the lifestyle of the parties while they were living together as husband and wife. The same analysis generally should be followed where expenditures are made for reasonable living expenses with jointly owned funds. There is, however, one substantial caveat in the case of expenditures from jointly owned funds. If the spouse making such an expenditure does have individually owned funds, and if the spouse derives an unfair benefit from the use of the jointly owned funds for personal living expenses, then the expenditures should constitute dissipation.

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155. *See supra* note 109 (California, Nevada, and Washington statutes).

156. As has been mentioned previously, Louisiana, a community property jurisdiction, permits a spouse acting alone to make a usual or customary gift of community property of a value commensurate with the economic position of the spouses at the time of the donation. *See supra* note 109. Wisconsin, following the provisions of the UMPA, permits a spouse to make a gift of marital property which falls within certain dollar limits or which is reasonable in amount considering the economic position of the spouses. *See supra* note 127.

157. I am not aware of any decision which discusses whether such a gift is reasonable under state law permitting a reasonable gift. Certainly, however, decisions have held that such a gift constitutes reimbursable dissipation or diminution. *See, e.g.*, Morrison v. Morrison, 713 S.W.2d 377, 379 (Tex. Ct. App. 1986). One could argue, with some degree of force, that such a gift is so inconsistent with the marital relationship, at least while the spouses are living together, that such a gift should be per se unreasonable. It is possible that such a gift could be precluded under statutory language that, like the Louisiana statute described earlier, permits a "usual or customary" gift.

158. *See supra* text accompanying notes 66-75.

As a general proposition, an expenditure of funds by one spouse for the reasonable living expenses of the *other* spouse or of the children of the parties should not constitute dissipation. Again, however, certain specific circumstances require a more complex analysis. Thus, where one spouse's use of jointly owned funds to pay for living expenses of the other spouse or of the children of the parties would create an unfair benefit for the payor spouse, such payments may be viewed as constituting dissipation. For example, if the expenditures are made to satisfy an obligation created by a court support order, then the order should be viewed as making the ordered payments an individual obligation, and, therefore, the spouse should not be able to use jointly owned funds as a source of the ordered payments. However, the use of separately owned funds to comply with a court support order seems unobjectionable, even if the separately owned funds are subject to equitable distribution, because there is no other alternative.

Even where no court order is outstanding, a spouse who uses jointly owned funds to pay for living expenses of the family may run into the contention that the use of jointly owned funds confers an undue benefit and therefore constitutes dissipation. For example, assume that an economically independent spouse who would normally bear most of the child and spousal support burden uses jointly owned funds to pay for familial living expenses, notwithstanding the fact that that spouse also separately owns funds that are *not* subject to equitable distribution. It may well be that such a spouse derives an unfair benefit from use of the jointly owned funds, and that such use constitutes dissipation.[159]

The role of consent and acquiescence in dissipation cases is an interesting and largely undeveloped area of the law. The few decisions on point indicate, and I think correctly so, that consent given in advance of or contemporaneously with an expenditure should bar a finding of dissipation.[160] The purpose of the dissipation doctrine is to protect the interest of a spouse and once a spouse has agreed to an expenditure no reason exists to protect that spouse, assuming competence to make a decision. Moreover, if consent to an expenditure is manifested in advance to an expending spouse, it would be unfair to later hold the expending spouse responsible under the dissipation doctrine. This consent rule should include implied as well as express consent. Although an implied consent defense may present difficult factual issues on occasion, a rule that excluded an implied consent defense while allowing a defense of express consent could present even more difficult factual issues. More importantly, implied consent is nevertheless consent and should be recognized as such. Note, however, that if consent in advance is a defense, then protest (*i.e.*, the manifestation of objection

159. *See supra* note 78 (discussion of *Grandovic v. Grandovic*).

Note, however, that in this situation, a spouse with separately owned funds in a state where such funds are not subject to equitable distribution may be placed in a difficult dilemma. If the spouse uses marital assets to pay the living expenses, the spouse can be charged with dissipation of the full amount of the expenditure; but if the spouse uses individually owned funds that are not subject to equitable distribution, the spouse may lose any chance at reimbursement from the other spouse if the other spouse has a partial responsibility for payment of the expenses in question (*e.g.*, college expenses for the children of the parties).

160. *See supra* discussion at note 86.

rather than consent[161]) in advance of an expenditure negates any contention of consent. The mere presence of protest, however, does not establish per se dissipation.

So far as I am aware, no decisions to date have focused on whether following an expenditure there can be a defense based on ratification or acquiescence by a spouse who did not have knowledge prior to the expenditure.[162] A concept of ratification or acquiescence would present interesting issues of definition. For example, would mere knowledge of an expenditure and failure to protest constitute acquiescence, or would some positive manifestation of consent be necessary? Although it is a close question, I would not allow such a defense. First, it is difficult to determine at what point ratification or acquiescence would occur. For example, if spouses continue to live together after knowledge by the innocent spouse, will ratification be found? Is a mere protest after the expenditure sufficient to preserve the rights of the protesting spouse? If so, why? What actual purpose—other than satisfaction of a legal construct—is served by the protest? Second, no unfairness to the spending spouse results from denying such a defense, and there can be no possible reliance argument, because the expenditure has already occurred.

The burden of proof in dissipation cases deserves some analysis. As discussed *supra*, judicial decisions in some states utilize a rule that shifts the burden of proof in dissipation cases.[163] The Illinois rule can serve a useful purpose by avoiding an interpretation of the usual rules regarding the burden of proof that would require the spouse claiming dissipation to prove precisely what disposition the other spouse made of the funds in question, even where the funds were under the exclusive control of the spouse who made the expenditures in question. However, the rule may be too broad if applied to every charge of dissipation. Rather, the rule shifting the burden of proof should only be applied where the other spouse makes out a prima facie case of dissipation by showing unexplained and unconsented to expenditures of funds that would have been subject to equitable distribution. (Where, under state law, the dissipation doctrine contains a marital breakdown requirement or similar limitation, then, under usual burden of proof concepts, the spouse charging dissipation must also prove that such requirement has been met. However, imposing such a burden of proof on the spouse charging dissipation seems unfair because the relevant facts,

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161. The line between a refusal to consent and a mere questioning of the wisdom of an expenditure may be difficult to draw, but courts are competent to resolve such questions.

162. *Cf.* the Legislative Council Committee Supplemental Notes to WIS. STAT. ANN. § 766.53 (Supp. 1989), which statute essentially follows § 6(a) of the UMPA's approach in restricting gifts by one spouse of marital property. (The Wisconsin and Uniform Act provisions are discussed in more detail *supra* at note 127.) These notes apparently recognize the existence of ratification following a gift that would have otherwise been prohibited. The Legislative Council Committee Supplemental Notes to § 766.53 state:

> Questions have been raised concerning the requirement that, for certain gifts of marital property, s. 766.53 requires the spouses to "act together." In reviewing and revising the gift rule, the special committee concluded that the rule does not require spouses to act simultaneously to be considered to be acting together; subsequent conduct by the other spouse is sufficient. It is assumed that common law doctrines regarding consent, such as estoppel and ratification, apply.

163. *See supra* notes 92-93 and accompanying text.

such as the precise time at which the expenditures were made, are often within the exclusive knowledge of the spouse who made the expenditures.)

It may be objected that the rule shifting the burden of proof is unfair because a spouse spending funds that would be subject to equitable distribution must, in order to protect herself, make records of all such expenditures that are made from funds subject to equitable distribution. (In a variation of this argument, in *In re Marriage of Getautas*[164] it was contended that the marital breakdown requirement was necessary because otherwise a spouse would at the time of trial have the burden of proving that expenditures at any time during the marriage did not constitute dissipation.[165]) However, the burden of proof is shifted only where a prima facie case has been made. If the spouse charging dissipation has not proven the unexplained and unconsented to expenditure of funds, then there is a failure to prove a prima facie case. Moreover, in evaluating the evidence offered by an allegedly dissipating spouse it should be clear that failure to record the transaction and inability to recall over passage of time do not necesarily amount to a failure of proof. Instead, testimony of inability to recall the details of a particular transaction should be carefully weighed in light of what is recalled, the magnitude of the transaction, and all other relevant circumstances.

VI. CONCLUSION

There appears to be ample authority, statutory and case law, in common law states permitting consideration of dissipation or diminution of assets subject to equitable distribution as a factor in making equitable distribution. However, common law states have not otherwise agreed upon or developed a sufficient analytical structure regarding the problem of dissipation or diminution of such assets. Thus, this article has pointed out substantial deficiencies in the law of those states which either require that in order for dissipating conduct to be considered, the conduct must have occurred after some form of marital breakdown,[166] or which require that the conduct must have been motivated by an intent to adversely affect the property rights of the other spouse upon divorce.[167] Moreover, there are serious differences about whether basic types of expenditures constitute dissipation.[168] The law as to such a basic area as the effect of consent or acquiescence also is essentially undeveloped.[169]

This article has suggested an analysis of some of the questions that arise when dissipation claims are made. In view of the increasing number of cases in which claims of dissipation or diminution are being made, it is, correspondingly, increasingly important for courts to develop complete, consistent analyses of this difficult area of law.

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164. 189 Ill. App. 3d 148, 544 N.E.2d 1284 (1989).
165. *Id.* at 154-55, 544 N.E.2d at 1288.
166. *See supra* discussion at notes 45-54 and accompanying text.
167. *See supra* discussion at notes 55-57 and accompanying text.
168. *See supra* discussion at notes 60-85 and accompanying text.
169. *See supra* discussion at notes 86-88 and accompanying text.